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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1006

LOUIS OSTRER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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No. .

LOUIS OSTRER,
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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit.

Louis Ostrer petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the District Court's denial of his motion for a new trial.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York denying the motion for new trial is as yet unreported and is found in Appendix 1, *infra*. The opinion of the Court of Appeals, also not yet reported, is found in Appendix 2, *infra*.

Jurisdiction and Proceedings Below.

On January 26, 1973, defendant-petitioner, Louis Ostrer, was convicted in the District Court for the Southern District of New York after a three-week jury trial on 17 counts involving a complicated stock manipulation scheme. On April 12, 1973, petitioner was sentenced to three years' imprisonment and a $55,000 fine. On appeal, his conviction was affirmed in a judgment of the United States Court of Appeals for the Second Circuit entered March 1, 1974. Certiorari was denied on October 15, 1974. 419 U.S. 829.

Subsequently, Ostrer learned that, prior to and during his Federal trial, his office telephone and premises were unlawfully being monitored by agents operating out of the Office of the District Attorney for New York County, by means of both a telephone wiretap and an electronic eavesdropping device ("bug") that picked up every telephone conversation and indeed every word spoken in the room. Because Ostrer had had innumerable legal strategy and related discussions with his lawyers and with others on those very telephones and in his office premises, Ostrer had reason to believe that such discussions must have been listened to and perhaps recorded by the District Attorney's surveillance unit. He filed a motion for a

new trial, based upon what the court below has found to be the newly discovered evidence of the wiretap and eavesdrop, and he asked for an evidentiary hearing to determine if his trial was in any way infected by Fourth and/or Sixth Amendment taint.

An evidentiary hearing lasting three days was held before the Hon. Charles L. Brieant of the District Court. Judge Brieant, in a written opinion, denied the motion, although he did concede that "Ostrer's claims are colorable," that "the issues tendered arise in a sensitive area affecting the fundamental constitutional rights of persons charged with crimes" (App. 35a), and that "we cannot say that this motion was in any sense frivolous" (App. 36a). A panel of the Court of Appeals affirmed on the basis of the trial court's opinion, and a petition for rehearing was denied on December 21, 1976 (Appendix 3, *infra*). This Court has jurisdiction to review the judgment below under the provisions of 28 U.S.C. § 1254.

Constitutional Provisions Involved.

UNITED STATES CONSTITUTION.

Amendment 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Questions Presented.

I. Whether a showing of specific prejudice is required as a condition for a new trial where (A) there has been concededly unlawful Government overhearing of lawyer-client legal strategy discussions before and during the pendency of petitioner's Federal criminal trial; (B) the "thrust" of the overheard lawyer-client strategy has been directly and deliberately communicated to the Assistant United States Attorney who prosecuted the petitioner; (C) the communication of this overheard lawyer-client strategy may well have affected the prosecutor's trial strategy involving a potential witness; and (D) the crucial records concerning the communication of the lawyer-client strategy discussions have mysteriously disappeared from the custody of various Government officials.

II. Whether, if a showing of specific prejudice is required, there should be a heavy burden on the defendant to make that showing (as the lower courts here held) or whether courts should "properly resolve doubts in favor of defendants" (as the Solicitor General recently argued before this Court in *Weatherford* v. *Bursey*, No. 75-1510, argued December 7, 1976).

Introductory Statement.

These important issues — which are currently before the Court in a far less compelling civil setting (*Weatherford* v. *Bursey*) — arise in the instant case in the context of the following uncontested facts, found by the trial court:

1. "On October 25, 1972, while Ostrer was awaiting trial under this indictment," New York City police officers assigned to the New York County District Attorney's office conducted an electronic surveillance — "using bugging and telephone

wiretapping orders" — of Louis Ostrer's business premises. This surveillance continued throughout the trial preparation and actual Federal trial of Ostrer (App. 3a).

2. "It has been stipulated for purposes of this motion that this surveillance conducted by state law enforcement authorities was in violation of Ostrer's Fourth Amendment rights. [T]he constitutional invalidity of this eavesdropping is not in dispute . . ." (App. 24a).

3. During the course of this unconstitutional surveillance, the District Attorney's office overheard repeated discussions concerning "the impending federal trial . . ." (App. 4a). "Among the more significant topics discussed were, (1) whether Ostrer should seek a trial severance from his co-defendant John Dioguardi; (2) whether Ostrer should waive his right to a jury trial and testify in his own behalf; (3) the likely impact of Ostrer's testimony, considered in light of disclosure on cross-examination of his prior state felony conviction as impeachment; and (4) the tactical value of having Ostrer introduce certain cancelled checks. Also mentioned was the name of Ostrer's private investigator, one James Lynch, formerly of the Federal Bureau of Investigation. None of the conversations were with Maurice Edelbaum, Esq., then Ostrer's counsel of record in the federal case, but at times the conversations included discussion by others with Ostrer of Mr. Edelbaum's comments and advice." (App. 4a.)

4. During the course of the unconstitutional surveillance, the District Attorney's office overheard the giving of "legal counsel"[1] to Ostrer by one of his attorneys, Julius Novem-

[1] "We are persuaded that during the course of pre-trial preparation, Ostrer reasonably believed that November was extending legal counsel, rather than friendly advice. The testimonial privilege against disclosure of attorney-client communication is applicable where the client entertains good faith belief (even if erroneous) that the person consulted is a lawyer, *and* is acting as such on his belief." (App. 6a; emphasis in original.)

ber.[2] This legal counsel related directly to the pending Federal indictment and forthcoming trial and covered, *inter alia*, how to deal with a potential Government witness at trial.

5. The Government has formally conceded on the record that the overheard conversations were such that, "[h]ad all of the information which was intercepted over the wire been communicated to a Federal prosecutor, I would say there had been some unconstitutional interception of defense communications." The trial judge seemed to agree that a new trial would be required had all the intercepted information been communicated to the Federal prosecutor.[3]

6. The trial court made the critical finding that "[Assistant District Attorney] Fine did transmit information to [Assistant United States Attorney] McGuire that he derived from the eavesdropping on Ostrer's conversations . . ." (App. 25a). Moreover, the "information" that Fine transmitted to McGuire concededly was derived directly from "legal counsel" given by Ostrer's attorney, Julius November, to Ostrer concerning the strategy toward a prospective Government witness at the Federal trial.

7. Finally, the Government concedes that "the thrust of the conversation" between Ostrer and his attorney discussing the legal strategy to be employed in dealing with a potential Government witness was transmitted to the trial prosecutor in Ostrer's Federal case (Government's brief on appeal at p. 45).

Accordingly, the record of this case contains uncontested facts giving rise to a classic Sixth Amendment intrusion into the lawyer-client communications involving a Federal criminal

[2] "We therefore conclude that, for purposes of this motion, November was acting as an attorney for Ostrer" (App. 6a).

[3] "If everything which the D.A.'s policemen did record or could have recorded which occurred in Ostrer's office prior to verdict had been transmitted fully and immediately to [Assistant United States Attorney] McGuire, our view of this motion would be different" (App. 28a).

defendant.[4] All of the elements of such an intrusion have been conceded by the Government and found by the trial court. Yet the motion for a new trial was denied. The reasons given by the trial court for denying the new trial came down, in essence, to these: Although it is surely possible that Ostrer may have been prejudiced at his Federal trial, Ostrer did not satisfy the District Court's extremely high burden of factually demonstrating specific and documentable prejudice. Moreover, although it is undisputed that the Federal prosecutor received information that he never would have received but for the unconstitutional intrusion into Ostrer's lawyer-client communications, there is no evidence — the trial court concluded — of bad faith on the part of Government officials. The District Court held that, without a showing of bad faith on the part of the Federal Government, the defendant must make an evidentiary showing of specific prejudice.

A panel of the Court of Appeals — consisting of Judges Mulligan, Lumbard and Van Graafeiland — affirmed on the basis of the trial court's opinion. Statements made from the bench during oral argument on October 26, 1976, suggest that at least one judge of the panel did not regard *legal strategy discussions* to be protected by the Sixth Amendment, since legal strategy, Judge Van Graafeiland suggested, is often designed to hide the truth rather than to reveal it.[5] This, of course, is not the law, nor could it be. If the trial prosecutor learned from an illegal wiretap — or for that matter from any wiretap, legal or illegal — that the defendant had decided upon a legal strategy not to take the witness stand, and if the prosecutor had designed his case around this information

[4] The violation is, of course, not limited to the Sixth Amendment; the wiretap was also concededly in violation of the Fourth Amendment, as well as the Federal and state wiretap statutes.

[5] None of the comments by the other judges on the panel suggested disagreement with this view.

(which he may very well have done in this case), then surely the resulting conviction could not stand — even if the explicit purpose of the defense strategy was to prevent the truth (or at least as much of it as the defendant could supply) from emerging. As the Supreme Court has long recognized, one of the very purposes behind the Bill of Rights — especially the Sixth Amendment — is precisely to permit a criminal defendant to make strategic decisions with the aid of professional advice from trained counsel. *See, e.g., Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Geders* v. *United States*, ____ U.S. ____, 96 S. Ct. 1330 (1976).

Indeed, in *Weatherford* v. *Bursey*, (No. 75-1510, argued December 7, 1976), the Solicitor General virtually conceded in his brief that a new trial would be required in a case like this one where "the surreptitious [presence of a] third ear" has overheard legal strategy discussions (Solicitor General's brief at p. 40), and where there has been "actual acquisition by the prosecution of confidential defense strategy information" (*id.* at p. 32). Moreover, at least five Circuits have rejected the Second Circuit's approach and have now adopted the rule that a new trial will be required without a showing of prejudice in all cases where there has been "the actual gaining . . . of information relative to a charge against [a] defendant . . . from an intrusion into the attorney-client privilege." See *infra* at pp. 16-17.

Statement of Facts.

Louis Ostrer's office was the subject of telephone wiretapping and electronic eavesdropping from October 24, 1972, until February 20, 1973. The wiretapping picked up his telephone conversations, and the eavesdropping picked up conversations in the room. This wiretapping covered the period prior to and during the entire duration of the Belmont trial.

On November 21, 1972, Louis Ostrer and his long-time attorney Julius November had a conversation on Ostrer's office premises. Ostrer and his attorneys were at the time preparing for the Belmont trial, and the November 21st conversation concerned these preparations. Specifically, they were discussing the possibility that one Aubrey Moss might be called as a Government witness against petitioner.

The November 21st conversation between Ostrer and Attorney November[6] can be understood only in light of the background of the relationship between Moss and one Susan Gold, who worked as a secretary in Ostrer's office. Gold and Moss had been having what was for Moss an extra-marital affair. During the course of his relationship with Gold, Moss had told her a number of exculpatory and favorable things about Ostrer.

Gold had told all of this to Julius November, and November had her put some of it in a written statement that he had in his hand on the night of the critical November 21st bugged conversation with Ostrer. The tape of the bugged conversation reveals that November was aware, *inter alia*, that:

(a) Moss had a grudge against Ostrer, and Susan Gold knew this from Moss' own mouth.

(b) Moss had threatened to ruin Ostrer by testifying in the Belmont case.

(c) Moss was now denying that he had a grudge against Ostrer, but Gold knew that he was lying.

(d) Gold knew that the real reason Moss had cancelled a huge life insurance policy, written through Ostrer's agency, was his eagerness to demonstrate to the United States Attorney that he (Moss) was no longer on Ostrer's side and could be depended upon to testify against Ostrer.

(e) Ostrer had actually paid Moss back a good portion of Moss' losses in the Belmont collapse, and hence it was Ostrer,

[6] The court below found that there was an attorney-client relationship between Ostrer and November (App. 6a).

and not Moss, who ended up being swindled and ruined by the stock manipulation.

(f) Moss was a liar and a cheat, having lied for years to his wife and his mistresses.

(g) Susan Gold was available to take the stand, and no one could "get" to her to convince her to change or withhold testimony, since she had given November a signed statement.

(h) Most critically (as Fine learned from listening to this tape), the Federal Government "doesn't know this . . . , and they believe this guy [Moss] is a high, high responsible businessman."

During the course of the conversation, November revealed that he had gotton the written statement from Gold just in case Moss "gets to her" to try to get her to change her testimony. "Then you can use this, that she gave a statement."

From the context of the Ostrer-November conversation, it is clear that November contemplated several possible benefits that could be derived from having Susan Gold available as a defense witness. First of all, in the event Moss realized that she was available, he might try to get out of testifying altogether in order to avoid having it revealed that he had been having an affair.[7] On the other hand, if Moss decided to take the stand, Gold's availability as a witness might have the prophylactic effect of deterring Moss from lying about Ostrer and saying all kinds of derogatory things about him that would conflict directly with the things he had earlier told Gold about Ostrer, for Gold could then take the stand and show the jury what a liar Moss was, and why he was motivated to lie about Ostrer.[8] And finally, of course, if Moss took the stand and told his lies about Ostrer, the defense would indeed put Gold on the stand to tell all, including how Moss was suddenly changing his tune about Ostrer, his motives, and the kind of man Moss really was.[9] He would have been, as November notes, destroyed as an effective prosecution witness.

[7] Thus, November at one point said to Ostrer that if Moss learned that Gold was available as a witness, "I don't think he takes the stand. . . ."

Perhaps most important of all, however, the bugging tape picked up the fact that the Federal prosecutor was entirely unaware that Moss was such a flawed and dangerous witness

[8] "But you [Ostrer] yourself said it's a matter of record he [Moss] made a bundle right, he kept it didn't he. . . . He's [Moss] absolutely destroyed." Thus, Gold could testify that Moss told her that he made a profit in the Belmont deal, and was not a swindle victim of Ostrer at all. "So I said [to Gold] well I don't know about that but I do know that you would know if he made a big profit in the stock." "He [Moss] says that he was swindled; now here [in Gold's written statement] he swore to get you [Ostrer], right?" Thus, Gold can testify as to Moss' venom against Ostrer. "[H]ere's a man who made a bundle and didn't give anything to the man he is now accusing, right, of stealing from him, and here's a man who again relinquished the stock to Ostrer." (This latter bit of conversation is November's reference to the fact that Gold knew that Ostrer, pursuant to his obligation to hold Moss harmless for his losses, turned over to Moss as collateral certain shares of his own stock, and got the stock back from Moss upon payment of the latter's losses. This would contradict Moss' claims of having been cheated and swindled by Ostrer, who lost a fortune in the Belmont collapse.) The references to Ostrer's indemnification of Moss, and of Moss' refusal to share his profit on earlier-sold shares with Ostrer, were all references, of course, to the terms of Moss' 50-50 deal to split profits with Ostrer in the Belmont deal.

[9] "Here the man is a whoremaster. He's been running around with women. . . . The jury, they will say, here's a man that is burnt up, right? Here's a man that is so low he is cheating on his wife; here's a man that took a single girl to Europe, a married man."

for the Government.[10] The Government would, indeed, have been walking into a trap to put Moss on the stand.[11]

In addition to this critical Ostrer-November conversation, the wiretap picked up an enormous amount of discussion relating to legal strategy.[12] See *supra* at p. 5.

[10] "But now here the government doesn't know this, see. And they believe this guy is a high, high responsible businessman, right? He says that he was swindled; now here he swore [to Susan Gold] to get you, right? Here the man is a whoremaster. . . ."

[11] The trap was even more dangerous for the Government, for in addition to destroying Moss as a Government witness, Ostrer's defense team had a plan for turning Moss into a potent defense witness by introducing through him certain evidence exculpatory to Ostrer.

[12] The items recorded on tape represent the very *minimum* amount of material overheard by the District Attorney's office. Several monitoring agents testified that some items overheard but not recorded were summarized or mentioned in the "plant reports" that were made up to summarize overhearings. And while the agents were instructed not to tape attorney-client conversations, they did record the Ostrer-November conversation. And, perhaps most important of all, Assistant District Attorney John Fine, who was in charge of the monitoring operation, testified that plant monitoring agents may well have conveyed information directly to him above and beyond what information he might have gotten from reading the plant reports and hearing the tapes.

On the very same day that the bugged Ostrer-November strategy conversation took place (namely, November 21, 1972), Assistant United States Attorney McGuire interviewed at his office Aubrey Moss, in preparation for the latter's testimony at the Belmont trial. Coincidentally, the very next day, the wiretap picked up another conversation about Moss, in which Ostrer discussed Moss' grudge against him.

In addition, sometime between November 24 and December 5, 1972, the wiretap picked up the fact that an investigator by the name of "Jim Lynch" was working for Ostrer in preparation for the Belmont case.

As the Belmont trial approached, McGuire quickened his preparations. On November 30, 1972, at McGuire's behest, a subpoena was issued to secure Moss' appearance as a witness at the trial. McGuire, who had read Moss' earlier SEC and grand jury testimony (App. 18a), and who interviewed Moss on November 21, 1972 (App. 18a), put him on his witness list.

Meanwhile, John Fine, upon hearing the Ostrer-November conversation of November 21st, approached his superior Mr. Scotti concerning contacting the United States Attorney's office in order to transmit to that office the fact that an "obstruction of justice" was being hatched by Ostrer and November to blackmail Moss. Mr. Scotti on December 21, 1972, spoke to Sylvio Mollo of the United States Attorney's office by telephone. Scotti told Mollo what the former described as the "substance" of the bugged Ostrer-November conversation, and they arranged to have Fine meet McGuire.[13] McGuire then phoned Fine to arrange such a meeting.

[13] The Court below found that "Scotti told Mr. Mollo that an Assistant District Attorney had information that would be of interest to the Assistant United States Attorney on the Ostrer case" (App. 17a).

The critical Fine-McGuire meeting took place at Fine's office on December 22, 1972. It was attended as well by a number of Fine's agents who worked on the Ostrer surveillance. It is difficult to determine precisely what was communicated by whom at the meeting, because memories of the witnesses were admittedly dim, Fine had lost his notes of this critical meeting, while McGuire testified that he did not take any notes. McGuire admitted that November's name may have been disclosed by Fine, and the judge found that McGuire knew that November was an attorney. The court below found that at this crucial December 22nd meeting,

> "Fine told McGuire, in substance, that Ostrer had certain information regarding Moss, and expressed his fear that this information would be used to effect an obstruction of justice."

(App. 18a). Fine informed McGuire that a man named "Jim Lynch" was working as an investigator for Ostrer (App. 19a), triggering in Fine and McGuire a concern lest this be the same Jim Lynch who used to or still did work for the F.B.I. and who could possibly constitute a security leak in the prosecutor's camp (App. 19a). Finally, the court below found that

> "McGuire told Fine that he [Fine] did not have to worry about an obstruction of justice, because it was not McGuire's *present* intention to call Moss as a witness, *at least, not as part of the Government's direct case.*" (Emphasis added.) (App. 18a.)

The court below also found that, during this Fine-McGuire meeting, McGuire "asked whether Fine was in possession of any material that would be useful for the cross-examination of

Ostrer." McGuire succeeded in obtaining from Fine, according to the court, only "a certified copy of Ostrer's prior state judgment of conviction and the transcript of his pleas to those charges, both matters of public record" (App. 19a).[14]

After this meeting with Fine, McGuire ordered that Moss be told to remain under subpoena during the duration of the trial (App. 20a). Moss wrote to McGuire confirming that he considered himself still under subpoena on call, although he did not actually have to be in court until further notice.

On December 29, 1972 — the eve of the Belmont trial — there was another communication between Fine and McGuire concerning the subject matter of the monitored lawyer-client conversation of November 21, 1972. Fine returned a phone call from McGuire, and they again discussed whether Moss had been subpoenaed for the trial.

On January 4, 1973, the jury was sworn, and on January 27th, after two and a half days of deliberations, a guilty verdict on eleven counts was returned. On February 20, 1973, the wiretap ended.

Finally, on April 18, 1973, a final meeting was held between McGuire and Fine, at which Fine revealed the source of his information, and told McGuire about the wiretapping. McGuire claims that this was the first time that he learned that the information communicated to him by Fine at the December 22, 1972, meeting stemmed from an eavesdropping of an attorney-client conversation. McGuire did not, how-

[14] During the evidentiary hearing, Judge Brieant appeared a bit skeptical, or perhaps perplexed, at why McGuire had to ask Fine for information that was a matter of public record and that McGuire could have obtained without bothering Fine at all, and that probably was not admissible anyway. It is interesting to note that McGuire admitted being "interested in prying as much material" as he could from Fine about the investigation.

ever, until after Ostrer's new trial motion was filed in December of 1974, undertake to inform either the court or defense counsel of this fact.[15]

Reasons for Granting the Writ.

A. There is a Direct Conflict among the Circuits over whether Specific Prejudice Must be Demonstrated where Confidential Defense Strategy has been Overheard and Transmitted to the Prosecution.

An exhaustive search of the cases reveals that the Second Circuit is the only Circuit to have *ever* affirmed a conviction in the face of a record on which the Government concedes that there was *actual communication to the trial prosecutor* of the thrust of unlawfully intercepted legal strategy sessions between a criminal defendant and his lawyer. Every other Circuit that has considered this issue — the Third, Fourth, Fifth, Eighth and District of Columbia — has adopted the rule that no prejudice need be shown where there has been "the actual gaining . . . of information relative to a charge against [a] defendant . . . from an intrusion into the attorney-client relationship." *United States* v. *Dodge*, 538 F. 2d 770, 779 (8th Cir. 1976); *United States* v. *Crow Dog*, 532 F. 2d 1182, 1198 (5th Cir. 1976; cert. pending, No. 75-1843); *United States* v. *Cooper*, 397 F. Supp. 277, 285 (D. Neb. 1975). The Third Circuit has held that, under such circumstances, a new trial will be required without a showing of

[15] Had McGuire done so, defense counsel would have been able to raise sooner the issues on his motion for a new trial, and a vital piece of evidence might have been preserved that was ultimately lost as a result of the delay.

prejudice, since "the possibility of prejudice implicit in such a situation is unlimited. . . ." *United States* v. *Rispo*, 460 F. 2d 965 (3d Cir. 1972). The District of Columbia Circuit has repeatedly held that "actual prejudice [need not] be shown in order to entitle defendants to a new trial" in Sixth Amendment intrusion cases. *Caldwell* v. *United States*, 205 F. 2d 879, 881 (D.C. Cir. 1953); *Coplon* v. *United States*, 191 F. 2d 749, 759 (D.C. Cir. 1951). The Fourth Circuit recently held — in the context of a § 1983 civil action — that the "[S]ixth [A]mendment right to counsel was violated . . . irrespective of any showing of substantial prejudice to his defense." *Bursey* v. *Weatherford*, 528 F. 2d 483, 487 (4th Cir. 1975). This Court has granted certiorari and the case was argued on December 7, 1976. The Fifth Circuit has stated that no showing of prejudice will be required where there has been, as here, "the actual gaining, rather than the mere opportunity for gaining, of information relative to a charge against [a] defendant. . . ." *United States* v. *Crow Dog*, 532 F. 2d 1182, 1198 (5th Cir. 1976; petition for writ of certiorari pending, No. 75-1843). In *United States* v. *Zarzour*, 432 F. 2d 1, 4-5 (5th Cir. 1970), the Fifth Circuit held that a new trial would be required even in the absence of demonstrable prejudice if "information concerning appellant's case was transmitted to the prosecution so as to violate [the defendant's] Sixth Amendment rights." See also *Gradsky* v. *United States*, 376 F. 2d 993, 997 (5th Cir. 1967). The Eighth Circuit recently "adopt[ed] the view" that no showing of "actual prejudice" will be required where there has been "the actual gaining, rather than the mere opportunity for gaining, of information relative to a charge against [a] defendant, and the information must be obtained by the informant from an intrusion into the attorney-client relationship." *United States* v. *Dodge*, 538 F. 2d 770 (8th Cir. 1976).

There can be no dispute on the record of this case that all the factors necessary for the invocation of this rule have been established — indeed, conceded — in the case at bar: the District Court found that state authorities unconstitutionally monitered confidential "legal counsel" given to Ostrer by one of his attorneys concerning "the impending federal trial," and that the state District Attorney "did transmit information to [Assistant United States Attorney] McGuire [the actual trial prosecutor] that he derived from the eavesdropping on Ostrer's conversations. . . ." (App. 6a, 25a.) Moreover, the Government has conceded that "the thrust of the conversation" between Ostrer and his attorney discussing the legal strategy to be employed in dealing with a potential Government witness was transmitted to the trial prosecutor in Ostrer's Federal case (Government brief at p. 43). There can be no dispute, therefore, that had this case arisen in the Third, Fourth, Fifth, Eighth or District of Columbia Circuits — or indeed probably in any Circuit other than the Second — a new trial would be required.

There is thus a clear and irreconcilable conflict among the Circuits over this important and recurring issue. We doubt that the Solicitor General will deny the existence of this conflict, since in his brief in *Weatherford* he repeatedly points to the line of prejudice cases in the Second Circuit as being in conflict with the no-prejudice approach of the Fourth Circuit. (See, *e.g.*, pp. 25, 29, 30.)

Even more significant, however, is that the rule sought by the Solicitor General in *Weatherford* would plainly require a new trial under the conceded facts of this case.

In *Weatherford*, the Solicitor General repeatedly emphasizes that "the trivial information Weatherford learned was not relayed to Strom, to the prosecutor, or to anyone else" (Brief at p. 44). He concedes that dangers of prosecutorial use of defense secrets do arise whenever there is "actual acquisition by the prosecution of confidential defense strategy information" (Brief at p. 32), and that "Sixth Amendment concerns

are activated in such circumstances because of the threat posed to the fair functioning of the adversary system." (*Ibid.*) Here, unlike in *Weatherford*, it is conceded that "actual acquisition by the prosecution" did occur.

The lower courts held, however, that a new trial was not required, since the "circumstances surrounding this intrusion do not suggest that the federal government or the District Attorney has acted *culpably*" (App. 26a; emphasis added). But the Solicitor General's brief in *Weatherford* completely undercuts this "culpability" or "bad faith" argument. The Solicitor General recognizes that the dangers to the Sixth Amendment are just as great if the defense strategy was overheard in good faith or in bad faith:

> "There may also be danger in prosecutorial use of defense secrets acquired in less devious ways. It is arguable that any use by the prosecutor, in the course of preparing for and conducting a criminal trial, of confidential information about defense strategy should be condemned, no matter how the information was learned. There is no significant legitimate prosecutorial interest in capitalizing upon confidential information about defense tactics, so long as those tactics are themselves legitimate. Use of such information, however acquired, could create a significant risk of interfering with the ability to mount an effective defense. There is a potential for mischief in the 'subtle benefits that might consciously or unconsciously accrue to the government in knowing the planned procedure, or even the state of mind of the defendant and his counsel *with respect to the trial*, quite apart from hearing affirmative evidence, or leads to evidence.' *Taglianetti* v. *United States*, 398 F. 2d 558, 570 (C.A. 1) (emphasis in original), affirmed on other grounds, 394 U.S. 316." Solicitor General's brief at pp. 30-31.

Accordingly, the Solicitor General asked this Court to fashion a rule which would deem any overhearing of confidential legal strategy to constitute a violation of the Sixth Amendment if there has been "actual acquisition by the prosecution of confidential defense strategy information" (Brief at p. 32). It is conceded that this is precisely the situation in the instant case. In such situations, no prejudice need be shown, since "subtle benefits . . . might consciously or unconsciously accrue to the government, or even the state of mind of the defendant and his counsel with respect to the trial . . ." (Brief, p. 31).[16] The Solicitor General has thus asked this Court to adopt the rule recently adopted by the Fifth and

[16] The underlying rationale of the rule requiring no actual showing of prejudice where there has been transmission of defense strategy to the prosecution is that there will often be cases where prejudice may well have occurred, but where it will be difficult to demonstrate such prejudice. Accordingly, the defendant is "relieve[d]" of the "practically impossible burden of proving that the unconstitutional conduct worked actual harm to him." *United States ex rel. Cooper* v. *Denno*, 221 F. 2d 626 (2d Cir. 1955), at 631 (Frank, J., concurring). It makes good sense to apply that rule to all situations where the external or uncontested facts establish that there was transmission. If the courts were to demand a showing of actual prejudice under these circumstances, they would necessarily be affirming a certain — though undeterminable — number of convictions where prejudice actually occurred but where it could not be proved. Thus the courts have reasonably decided that the policies of the Constitution require them to err on the side of requiring a new trial in some cases where prejudice may not have occurred, rather than err on the side of affirming some convictions in cases where prejudice may well have occurred.

The rationale of this "salutary, prophylactic rule" would, of course, not be served were it applied to situations where the external or uncontested facts provide no conceivable opportunity for prejudice. Since this category contains no cases where actual prejudice might have occurred, a rule requiring automatic reversal would simply have the effect of requiring new trials in a large number of cases where no possibility of actual prejudice existed.

Thus, before invoking the rule dispensing with the requirement of showing actual prejudice, the courts ask a threshold question: did the external or uncontested facts provide any reasonable opportunity for prejudice to have occurred? In answering this question, the courts will not look into the contested details of the situation (*e.g.*, who said what to whom and when),

Sixth Circuits — no requirement of demonstrable prejudice where the prosecutor has acquired confidential defense strategy — and the rule that was explicitly rejected by the Second Circuit in the instant case.

B. There is a Direct and Conceded Conflict between the Second Circuit's Decision in this Case and the Decisions of this Court in Black and O'Brien.

This Court has twice considered the issue of whether a showing of prejudice is required in cases where the Government has unlawfully overheard lawyer-client conversations.

In *Black* v. *United States*, 385 U.S. 26 (1966), this Court, in a factual context similar to the instant case, reversed the conviction and ordered a new trial without any showing of actual prejudice. The Court expressly considered — and rejected — a suggestion by the Government that the case be remanded for a hearing at which the issue of prejudice would be explored. In the *Black* case, the Solicitor General had

but will look instead to the general factual setting (*e.g.*, did an unlawful intrusion occur; was there any subsequent communication between the intruders and the trial prosecutors). If the general factual setting was such that prejudice could have occurred, the court will look no further; it will reverse and remand for a new trial without requiring the defendant to shoulder the difficult burden of demonstrating specific prejudice.

In light of the stated rationale for the rule, it is clear that the paradigm case for its application is a situation where there was unlawful interception and subsequent communication under circumstances where there was ample opportunity for prejudice to have occurred, but where the possibilities of *demonstrating* actual prejudice are slight, because of the Government's failure to keep adequate records.

The Ostrer case presents the paradigm situation for application of the rule, since it is conceded (1) that numerous legal strategy meetings between Ostrer and his attorney November were unlawfully overheard, and (2) that those who overheard their meetings subsequently met with the actual prosecutor at Ostrer's trial and communicated to him at least some information that was learned from the unlawful electronic surveillance. It is also conceded that no written or taped records were preserved of this meeting, though the Government concedes that Fine made a memorandum. Thus, the opportunity for prejudice was great; and the possibility of demonstrating actual prejudice was slight as the result of the Government's failure to preserve its records.

advised the Supreme Court that F.B.I. agents had installed a listening device in petitioner's hotel room "in a matter unrelated to this case." *Id.* at 27. The device picked up some exchanges between petitioner and his lawyer. The Solicitor General "was able to represent to the Court" — on the basis of a full investigation — that "none of the information so procured had been utilized in Black's aforesaid prosecution." 385 U.S. at 30. Indeed, it was not until well after the trial was over that the Government lawyers in charge of the case first learned that any conversations between Black and his attorney had been overheard. (This, of course, is essentially what happened in the instant case, except that here it was the state rather than the F.B.I. that conducted the electronic surveillance in an "unrelated" matter.) The Solicitor General did tell the Court in *Black* that an opportunity for prejudice existed, since notes summarizing parts of the interrupted conversations were included in the material sent to the lawyers preparing the case. *Id.* at 28. (This too is essentially what happened here, except that the transmission in this case was oral rather than in writing, thus increasing the possibility that more was actually communicated than was recalled at the hearing.) The Solicitor General in *Black* suggested that the case be remanded to the District Court for a prejudice hearing, in which the "relevant materials would be produced and the court would determine, upon an adversary hearing, whether petitioner's conviction should stand." *Id.* at 28. The Court rejected the Solicitor General's suggestion. It held that since "the Tax Division attorneys did not know at the time of the trial that conversations between Black and his attorney were included in the transcriptions," *id.* at 28, a prejudice hearing would not suffice, and a new trial would have to be ordered. (This, of course, is precisely the situation here, since McGuire also "did not know at the time of the trial" that the content of unlawfully monitored lawyer-client legal strategy

sessions "were included" in the communications.) Thus, the Court held, in no uncertain terms, that since there was an *opportunity* for subtle — indeed unconscious — prejudice, the Government would be denied its request to show, at a hearing, that no *actual* prejudice occurred. Two justices dissented explicitly on the issue of prejudice.[17]

Black v. *United States* is dispositive of the case at bar. In that case actual prejudice was not demonstrated or apparently even *alleged* by the defendant. In *Black* there was written communication between the agents who overheard the intercepted conversations and the Government lawyers, but there was no dispute over the conclusion that "none of the information so procured had been utilized in Black's aforesaid prosecution." 385 U.S. at 30. Here that conclusion is very much in dispute: it is petitioner Ostrer's vigorous contention that matters overheard during the unlawful monitoring of his legal strategy discussions with his attorney were, in fact, "utilized" in his prosecution. Certainly the state of the record — especially in light of the absence of written records of the critical meetings — does not exclude the possibility that the Federal prosecutor may have learned, for example, that Ostrer had decided not to take the witness stand at his trial. It is, of course, conceded that the Federal prosecutor did learn that Ostrer had something on a potential Government witness. In the case at bar, therefore, the opportunity for prejudice was surely at least as great as in *Black*. Moreover, in *Black* it would at least have been possible to determine whether actual prejudice had occurred, since reports and memoranda "had

[17] The dissenting justices agreed that the petitioner was entitled to a "full-scale development of the facts" but argued that absent a showing of prejudice the conviction should stand. They recognize that the "basis" for the Court's decision "is that any governmental activity of the kind here in question *automatically* vitiates, so as at least to require a new trial, any conviction occurring during the span of such activity." *Id.* at 31. (Emphasis in original.)

been made" of all the material sent to the Government lawyers. These reports and memoranda — which were the *only* vehicle of communication between those who overheard the conversations and the Government lawyers — "were available." They could have been examined to determine precisely what information was communicated to the Government lawyer. In this case, on the other hand, although at least one memorandum was made, it has mysteriously disappeared from the District Attorney's file. Accordingly, it can never be known with any degree of certainty what information was communicated by Fine and the policemen to Assistant United States Attorney McGuire. Thus, the *opportunity for prejudice* was at least as great in this case as in *Black*; but *the opportunity to demonstrate actual prejudice* is considerably less available in this case — as the direct result of the unlawful wiretapper's failure to preserve his records. (See discussion *infra* at pp. 27-30.) Accordingly, the case at bar is a far more compelling one than was *Black* for the application of the rule requiring a new trial without an actual showing of prejudice.

This Court's decision in *O'Brien* v. *United States*, 386 U.S. 345 (1967), decided a year after *Black*, is even more compellingly dispositive against the lower court's requirement of actual prejudice. In that case the Solicitor General disclosed that the F.B.I., while tapping someone else's phone, had overheard a single isolated statement of the defendant to one of his lawyers, requesting the lawyer "to file an application relating to the territorial conditions of his release on bail."[18] Government's brief at p. 11. This conversation was

[18] "The attorney's words were not overheard." Government's brief at p. 11. (Here, of course, they were.) The F.B.I. also overheard a conversation between O'Brien and the owner of the premises who was the subject of the eavesdropping. That communication, which was of course not protected by the Sixth Amendment, was never communicated to Government lawyers. *Id.* at 11.

noted in the logs of the monitoring agents but *was not communicated* "to attorneys for the Department of Justice, including those who prosecuted this case." *Id.* at 11. Indeed, it was "not communicated in any manner outside the F.B.I." *Ibid.* The Solicitor General argued, therefore, that since "no evidence introduced at the trial was tainted in any manner by leads obtained from the overheard conversations," the case should not be remanded for a new trial. *Id.* at 11-12. However, this Court — citing *Black* v. *United States*, *supra* — reversed the conviction and ordered a new trial despite petitioner's implicit acknowledgement that no actual prejudice could be demonstrated. (See petitioners' reply brief in *O'Brien* at pp. 5-6.)[19]

In *O'Brien*, there had not even been any direct communication between those who overheard the conversation and the Government lawyers. Yet the Court reversed without any finding, or even allegation, of prejudice. In this case there was, of course, admitted communication between Fine and McGuire. There is, to be sure, a dispute over precisely how much was communicated and the exact effect this communication had on McGuire's trial strategy. But there is no dispute about the fact that communication concerning the Ostrer case did occur and that the opportunity for prejudicial communication did exist. This then is a far more compelling case for reversal than *O'Brien*. Indeed, there is no principled way of distinguishing the instant case from *O'Brien* or *Black*.

The Solicitor General, in his brief in *Weatherford*, appears to concede that cases such as this one cannot be distinguished from *Black* and *O'Brien*. The Solicitor General's attempt to distinguish *Weatherford* from *Black* and *O'Brien* places the facts of this case squarely within the holding of *Black* and *O'Brien*:

[19] The two dissenting judges characterized the material overheard by the F.B.I. as "peripheral, totally insignificant, and uncommunicated eavesdropping." 386 U.S. at 347.

"*Black* and *O'Brien* involved electronic surveillance; each gave rise to the specter of the 'surreptitious [presence of a] third ear' (*United States* v. *White*, 401 U.S. 745, 784 (Harlan, J., dissenting)). In each, 'unknown and unwanted intruders . . . furtively listened to [privileged] conversations.' *Lewis* v. *United States*, *supra*, 385 U.S. at 212. In each, the defendant and his attorney not only were unaware of the intrusion at the time it took place, but also remained ignorant of the intrusion until long after the criminal trial had been completed. During the *Black* and *O'Brien* trials the defendants and their attorneys lacked the knowledge that would have permitted them to listen to the trial testimony alert for evidence that might have been derived from an intrusion into defense strategy sessions; they could not probe on cross-examination the source of prosecution testimony to find out whether it was derived in part from defense discussions. It may well be that the Court believed that a taint hearing several years later would not be an adequate substitute for the type of scrutiny that takes place before or during the trial." Solicitor General's brief at p. 40.

In this case, every one of the factors mentioned by the Solicitor General as vital to *Black* and *O'Brien* is present as well: (1) the overhearing here involved "electronic surveillance" rather than a misplaced trust in an invited third party; (2) in this case, the defendant and his attorney also "remained ignorant of the intrusion until long after the criminal trial had been completed"; and (3) in the instant case, as in *Black* and *O'Brien*, a taint hearing several years later "would not be an adequate substitute for the type of scrutiny that takes place before or during the trial," especially in light of the disappearance of the crucial memorandum. See *infra* at pp. 27-30.

Accordingly, the Solicitor General concedes that there is no way of distinguishing the instant case from this Court's governing decisions in *Black* and *O'Brien*. The Second Circuit has simply been ignoring this Court's decisions in these cases. This case — because of its uncontested record — is the perfect vehicle for this Court to reconsider its decisions in *Black* and *O'Brien* and to either reaffirm them, limit them, or — though petitioner does not advocate this — reverse them. The current situation, however, is untenable: the Second Circuit is simply ignoring decisions by this Court which the Solicitor General concedes govern cases such as the instant one.

C. Even if there is a Requirement of Prejudice in Cases of Actual Transmission of Overheard Confidential Legal Strategy, the Lower Court Applied an Improper Standard in Imposing a Heavy Burden on the Defendant rather than "Properly Resolv[ing] Doubts in Favor of Defendants" (Solicitor General's Brief in Weatherford).

The trial court acknowledged that this was a close and subtle case on its facts, but he imposed a heavy burden on the defendant and resolved evidentiary doubts in favor of the Government. In *Weatherford*, the Solicitor General suggested the following formulation:

> "In cases in which it is alleged that an informant has overheard defense strategy discussions it will, of course, ordinarily be necessary to hold a taint hearing. It may be difficult, in many cases, to determine whether testimony at trial is a fruit of what the informant learned, *and courts might properly resolve doubts in favor of defendants.* We perceive no reason, however, for a rule that entirely dispenses with such an inquiry, other than as

a sanction for governmental misconduct of a kind that was wholly lacking here." (Emphasis added.) (Solicitor General's brief at p. 48. See also *id.* at p. 37.)

In light of this suggested formulation, petitioner respectfully requests that in the event this Court were to conclude that a showing of prejudice is required, it should nevertheless remand this case to the District Court for a new determination on the issue of prejudice, with directions to reconsider its factual demonstration in light of the rule requiring it to "properly resolve doubts in favor of defendants" in cases of this kind.

This rule is especially appropriate in this case where the critical document that could establish prejudice — namely, the District Attorney's detailed notes of his meeting with the Federal trial prosecutor — has mysteriously disappeared. This document was the only objective contemporaneous evidence of precisely what aspects of the monitored legal strategy conversations were, in fact, transmitted to the Federal prosecutor who tried petitioner's case. In the absence of this document, the court had to rely exclusively on the admittedly flawed and hazy recollections of Government agents and lawyers, all of whom had an admitted stake in affirming petitioner's conviction (App. 28a).

The disappearance of this potentially critical memorandum is curious, especially in view of the fact that state court proceedings against Ostrer continued until April 3, 1975 (when the District Attorney moved to dismiss the indictment). At that time, it was clear that Ostrer's motion for a new trial in the Belmont case was being pressed vigorously, and in fact a formal motion for the production of all tapes, logs, memoranda and other documents relating to the monitored conversations had been filed in January 1975. In fact, on April 7, 1975, Ostrer's counsel wrote to the United States

Attorney expressing keen interest in materials from the District Attorney's office and demanding that the United States Attorney take immediate steps to preserve some of these materials.

Under these circumstances, the Government should be taxed with a strong inference that the missing memorandum contains information favorable to the defendant — *i.e.*, further indications that more extensive information concerning Ostrer's Federal trial was relayed from Fine to McGuire.[20]

Nor can Fine's loss of his memorandum be attributed solely to the fault of *state* authorities. Fine attributed his failure to find his notes, at least in part, to the fact that, shortly before the evidentiary hearing in this case, the files of the District Attorney were relocated, and things got misplaced in the move. If that is true, it means that had Ostrer earlier known of the communications by Fine to McGuire of privileged information, he would have sooner filed his motion for a new trial and for an evidentiary hearing. He would thus have sought and, presumably, obtained Fine's notes prior to the move. A major reason why Ostrer did not move faster was because McGuire, who now admits to having learned of the wiretap at his April 18, 1973, meeting with Fine, did not on his own communicate to Ostrer's counsel or to the District Court that he had just learned that he had, prior to the Belmont trial, been given information by a man who had listened in on

[20] See *Cecil Corley Motor Co., Inc.* v. *General Motors Corp.*, 380 F. Supp. 819, 859 (M.D. Tenn. 1974); *Galella* v. *Onassis*, 353 F. Supp. 196, 205 (S.D. N.Y. 1971), affirmed in part, reversed in part, 487 F. 2d 986 (2d Cir. 1973); *The Motor Launch No. 12*, 65 F. Supp. 252, 253 (E.D. Pa. 1946); *Dow Chemical Co.* v. *S.S. Giovannella D'Amico*, 297 F. Supp. 699, 701 (S.D. N.Y. 1969); *Wenninger* v. *United States*, 234 F. Supp. 499, 508 (D. Del. 1964), affirmed, 352 F. 2d 523 (3d Cir. 1965); *Ford* v. *United States*, 210 F. 2d 313, 317 (5th Cir. 1954), and cases cited. *Cf. Vick* v. *Texas Employment Commission*, 514 F. 2d 734, 737 (5th Cir. 1975); *Matter of Grace Line, Inc.* v. *S.S. Santa Leonor*, 397 F. Supp. 1258, 1269 (S.D. N.Y. 1973); *United States* v. *Pollock*, 417 F. Supp. 1332 (D. Mass. 1976).

bugged attorney-client conversations. McGuire's deliberate suppression of this information for nearly two years was inexcusable. See A.B.A., The Prosecution Function and the Defense Function.

The blame for the disappearance of this critical document must lie squarely at the door of the Federal prosecutor, therefore, because of his deliberate and inexcusable failure to inform the defendant or his counsel of the surreptitious overhearing and transmission of confidential legal strategy information.

In *Weatherford*, the Solicitor General explicitly acknowledged that "we recognize that at times it may be difficult to determine whether any defense confidences have been passed on to the prosecution by an agent . . . or have been used in some indirect way to ease the prosecutor's burden" (Brief at p. 37). The Solicitor General argued that this difficulty is particularly acute in a case like this one where "a taint hearing several years [after the trial] would not be an adequate substitute for the type of scrutiny that takes place before or during the trial" (*id.* at p. 40). This argument is especially compelling where, as the direct result of inexcusable failure by the Federal Government to alert the defense to the overhearing and transmission until *years* after the trial, crucial documentary evidence which could have established the taint has been lost. For that reason, the Solicitor General's proposed rule, that courts should "properly resolve doubts in favor of defendants" should have been — but plainly was not — followed here.[21]

[21] Indeed, at various points throughout the District Judge's findings and conclusions, doubts which were quite obviously perceived by the Judge were resolved plainly against the defendant. An obviously crucial instance in which the Judge thus shifted the burden onto the defendant is found at App. 32a, where the Judge admits that Moss' testimony, had it been given at Ostrer's trial, "certainly would have been relevant," but then he goes on to conclude that "it may not have exculpated Ostrer an the minds of the jurors. Rather, it might have shown guilt." The Judge thus concluded that Moss' testimony was not critical to Ostrer, since it *might* have been interpreted *against* him just as easily as it might have *helped* him. Similar examples are found in the District Court's opinion at App. 12a, 19a, 20a, 23a-24a, 27a n. 18, 28a, and 35a-36a.

Conclusion.

In *Weatherford* v. *Bursey*, this Court has *sub judice* the issue of whether a showing of prejudice is required in a civil damage suit where there was no communication to the prosecutor of material overheard by an invited third party. The Solicitor General acknowledges that this is an important and difficult issue. Whichever way it is resolved in the context of that case, the far more important and recurring question will remain whether — and if so what kind of — a showing of prejudice should be required for a new trial in a criminal case where confidential defense strategy is overheard by a "surreptitious third ear" and actually communicated to the prosecutor. This case presents an ideal record on which to resolve that issue — an issue which sharply divides the Circuits and over which there is an irreconcilable conflict between the decisions of this Court in *Black* and *O'Brien* and the decisions of the Second Circuit in the instant case and its predecessors. For the foregoing reasons, petitioner respectfully requests this Court to grant the petition for a writ of certiorari and to set the case down for oral argument.

Respectfully submitted,

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Appendix 1.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

LOUIS OSTRER,
DEFENDANT.

71 Cr. 558-CLB

Findings of Fact and Conclusions of Law following Hearing on Motion pursuant to Rule 33, F.R. Crim. P.

Brieant, J.

On January 26, 1973, after a three-week jury trial before Chief Judge Edelstein of this Court, defendant Ostrer was found guilty on eleven counts which charged him with violation of various provisions of the federal securities laws, mail fraud and conspiracy so to do.[1] The trial court acquitted Ostrer of twenty-three counts upon motion, and the jury acquitted him on the six remaining counts in this forty count indictment. The conviction was affirmed on appeal *sub nom. United States* v. *Dioguardi*, 492 F. 2d 70 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974).

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[1] In addition to the conspiracy charge, Ostrer was convicted of the substantive crimes of (1) causing a sale confirmation for stock of Belmont Franchising Corporation to be placed in the mail in furtherance of a fraudulent scheme for the sale of stock, in violation of 15 U.S.C. §§ 77q(a), 77x; (2) causing purchase confirmations for such stock to be placed in the mail as part of a manipulative device in connection with the purchase or sale of a security in violation of 15 U.S.C. §§ 78j(b), 78ff and Rule 10b-5, 17 C.F.R. § 240.10b-5; and (3) use of the mails as part of a scheme to defraud in violation of 18 U.S.C. § 1341.

Following the conclusion of his trial on these charges, Ostrer was arrested and indicted on unrelated state charges. In 1975, Ostrer's state indictment was dismissed when it became evident that the state's prosecution was founded upon electronic surveillance conducted pursuant to court orders, which, in turn, relied for their issuance upon the use of evidence later found to be tainted.

Ostrer now moves pursuant to Rule 33, F.R.Crim.P. for a new trial on these federal charges, based on newly discovered evidence, claiming that he was deprived of a fair trial and that his Fourth and Sixth Amendment rights were violated. An evidentiary hearing was held, during the course of which tapes of the electronic surveillance were received. For the reasons stated herein, defendant's motion for a new trial is denied.

Initially, we reject the Government's contention that defendant's instant motion pursuant to Rule 33, F.R.Crim.P. for a new trial should be treated by this Court as an independent action pursuant to 28 U.S.C. §2255 in the nature of a collateral attack upon the judgment of conviction. The issues raised are properly before this Court as a motion based on newly discovered evidence, since the fact of the state's electronic surveillance and the extent of its claimed intrusion upon his rights were unknown to him at the time of trial. Although the issues raised here constitute an attack on the judgments of conviction on constitutional grounds, which would be cognizable also in a §2255 action, there is a substantial overlap between the relief available pursuant to Rule 33 in the original criminal proceeding, and that available in a §2255 action. See 2 Wright, Federal Practice and Procedure §552 (1969). Defendant may elect to raise these issues, as he has done here, by motion for post-trial relief based on newly discovered evidence. In so doing, defendant assumes the burdens traditionally imposed on a defendant seeking such relief. See *United States* v. *Slutsky*,

514 F.2d 1222 (2d Cir. 1975). It must be observed that a court will not lightly refashion litigation seeking post-conviction relief. See *United States* v. *Huss*, 520 F.2d 598 (2d Cir. 1975). Where relief may be available under either Rule 33 or §2255, defendant should be permitted to litigate the issues in such form as he chooses.

Accordingly, we proceed to a consideration of the merits of the issues as framed by the defendant in his motion.

The Unlawful Electronic Surveillance.

On October 25, 1972, while Ostrer was awaiting trial under this federal indictment,[1] New York City police officers assigned to the Rackets Bureau of the Office of the District Attorney, New York County (hereinafter "D.A.'s Office") began electronic surveillance of Ostrer at premises leased to Fringe Programs, Inc. and Louis C. Ostrer Associates, at 377 Fifth Avenue in this City. The surveillance was authorized initially by orders of Justice Harold Birns of the Supreme Court of the State of New York, New York County, signed October 24, 1972. The D.A.'s investigation, at this time, was directed at obtaining evidence of suspected violations of the state's criminal usury law.

The surveillance "monitoring plant" was staffed solely by New York City police officers on assignment to the D.A.'s Office, and not by federal law enforcement personnel. These police officers would eavesdrop, using bugging and telephone wiretapping devices, and would record selectively those conversations which they deemed relevant to their investigation. Most other conversations were summarized in written "plant reports" maintained by the surveilling officers. Pursuant to

[1] This indictment was filed on May 27, 1971. On June 1, 1971 Ostrer was arraigned and pleaded not guilty.

instructions of the District Attorney, and in order to preserve security, all such reports were made solely to persons affiliated with the D.A.'s Office and directly concerned with the investigation.

The orders authorizing the surveillance were renewed upon the order of Justice Birns, signed on November 22, 1972.

Among the conversations memorialized on tape or summarized in the written plant reports, are several in which the impending federal trial is mentioned, and matters pertaining to it are discussed. In these conversations, Ostrer and several of his associates discuss pre-trial developments in the federal case. Participants in these conversations include various associates of Ostrer, among them Julius November whose relationship with Ostrer will be discussed further *infra*, pp. 5a-6a.

Among the more significant topics discussed were, (1) whether Ostrer should seek a trial severance from his co-defendant John Dioguardi; (2) whether Ostrer should waive his right to a jury trial and testify in his own behalf; (3) the likely impact of Ostrer's testimony, considered in light of disclosure on cross-examination of his prior state felony conviction as impeachment; and (4) the tactical value of having Ostrer introduce certain cancelled checks.[3] Also mentioned was the name of Ostrer's private investigator, one James Lynch, formerly of the Federal Bureau of Investigation. None of the conversations were with Maurice Edelbaum, Esq., then Ostrer's counsel of record in the federal case, but at times the conversations included discussion by others with Ostrer of Mr. Edelbaum's comments and advice.

These conversations cannot properly be characterized as defense strategy sessions. News of pre-trial developments was discussed and treated conversationally, as a current development in the life of Ostrer, much the same as any other important event might have been treated or considered. In numerous conversations, no attorney is present, and, in some, Ostrer is only an occasional participant. The tenor of these conversations varies, ranging in intensity from casual conversation to shouting bouts. Taken separately or together, except for those noted below, the conversations are of little significance.

[3] In one intercepted telephone conversation regarding these checks, Ostrer misrepresents himself as being an attorney named Mr. Levine, associated with the law firm of Julius November.

The November 21 and 30, 1972 Conversations.

On November 21, 1972, the surveilling officers overheard and recorded a conversation between Ostrer, William Kilroy and Julius November.

November is a New York attorney admitted to practice in this Court. He is a long standing friend and business associate of Ostrer. Since 1962 or 1963, November has represented Ostrer in various non-criminal matters, including civil litigation. Ostrer's trial counsel, Mr. Edelbaum, conferred with November on occasion prior to trial.[4]

[4] November attempted to have intelligent discourse with Edelbaum, who treated his client Ostrer, and November, with uniform patience and courtesy. To such an experienced advocate as Edelbaum, November was useless. The relationship was described by Edelbaum as follows (Tr. p. 347):

> "Q Did you confer with Mr. November in connection with the criminal case against Louis Ostrer?
>
> A I did.
>
> The Court: Did you retain Mr. November to assist you in any fashion?
>
> The Witness: No. Mr. November was Mr. Ostrer's civil attorney and handled many of his civil affairs. He was very interested in the criminal case and he was very interested in what we were doing and I would confer with him and tell him and ask him certain questions of what he may have known of the case.

At trial, November was a spectator, who occasionally walked over to the defense counsel table during court recesses. He did not appear as an attorney.

We are persuaded that during the course of pre-trial preparation, Ostrer reasonably believed that November was extending legal counsel, rather than friendly advice. The testimonial privilege against disclosure of attorney-client communications is applicable where the client entertains good faith beliefs (even if erroneous) that the person consulted is a lawyer, *and* is acting as such on his behalf. Wigmore on Evidence, §2302 (McNaughton rev.). Here, there is no doubt that November was an attorney, and that Ostrer knew that was his profession. In this context, we are concerned with more than a testimonial privilege. We are concerned with safeguarding a criminal defendant's constitutional rights to a fair trial and the effective assistance of counsel. We therefore conclude that, for purposes of this motion, November was acting as an attorney for Ostrer. *Cf. United States* v. *Scott*, 521 F.2d 1188 (9th Cir. 1975).

The November 21st conversation, which began with a discussion of certain loans owed by the participants, soon degenerated into a shouting match between Ostrer and November, liberally sprinkled with obscenities. November then showed Ostrer a typewritten statement he had prepared, signed by

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Q Did Mr. November on occasion, during the course of the criminal trial confer with you at counsel table?

. . . . . .

A On a few occasions he came to the table.

THE COURT: When did you first commence to confer with Mr. November about this indictment?

THE WITNESS: Oh, I think I conferred with him in November or early December of 1972, your Honor. It was somewhere in that area."

Susan Gold, an employee in Ostrer's office, and dated November 21, 1972 (Exhibit BB).[5] A discussion ensued concerning the contents of the statement and the use to which it could be put. From the conversation an eavesdropper could infer that the statement disclosed that Aubrey Moss, a married man whom Ostrer and November believed would be a Government witness in this case, was having an adulterous affair with Miss Gold.[6]

November suggested that Miss Gold's statement was so potent and would tend to discredit Moss' reputation to such a degree that Moss could not afford to take the stand and risk its disclosure.[7] November also suggested that Gold would be

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[5] Unless otherwise indicated, all reference to exhibit numbers are to exhibits introduced at the evidentiary hearing upon this post-trial motion.

[6] The Government did not obtain Gold's statement (Ex. BB) until after the verdict was returned in this case. The statement was provided to the United States Attorney by state law enforcement authorities who seized the statement in a search of Ostrer's office on February 21, 1973. This search was conducted pursuant to state warrant, but the warrant was issued based upon information obtained through the unlawful electronic surveillance. For purpose of our inquiry here, what is relevant is what was known prior to conclusion of the federal trial; necessarily, this is limiteu to the conversations overheard by the electronic surveillance, to the extent disclosed to the federal prosecutor, and does not include the Gold statement document itself.

[7] The tape of the conversation, a transcript of which was also received (Ex. T-3), includes the following:

"November: What I'm saying, this poor girl [Susan Gold] is crying, say Jesus Christ this will get me in. What girl would go out and do like this girl? This fuckin Moss is ruined. He ever takes the witness stand, he's wrecked all over. Read this shit. Read it.

Ostrer: Jules, I understand that.

November: Let it go.

Ostrer: What do you want me to do, give her a $400 raise?

November: Nah. She wants a stinking $10.

Ostrer: What are you talking about Jules?

November: The girl is in tears, you have her hung around here 3 or 4 hours.

Greenfield: Ah, she's ah, listen I'll

available as a witness to impeach Moss' credibility if he did take the stand, and that her written statement would be valuable if Gold were to recant. November advised Ostrer not to give his trial counsel, Mr. Edelbaum, a copy of the Gold state-

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November: Cut out all this shit Louie.

Greenfield: Don't worry about that, we'll take care of her.

. . . . . .

November: Talk is cheap, read that will ya please, (inaudible)

Ostrer: He [Moss] told her [Gold] he's taking the stand.

November: He won't take the stand with this, he can't afford to. He'd be disgraced.

Ostrer: But isn't, isn't this blackmail?

November: No. Where's the blackmail?

Ostrer: It's not?

November: Nobody will be around, we know who the hell, if she's sitting with him in a restaurant, he's gonna be wired? This is blackmail?

Ostrer: Is this intimidation? (inaudible)

November: No, no, you're entitled, don't you understand why I'm doing this? In case he gets to her. Then you can use this, that she gave a statement. In other words, you can attack the witness' credibility. The guy's a whoremaster. He's running around, he took her all over the fuckin world. A married man bought her all the shit and she's a single girl, right?

Ostrer: She would have to take the stand, wouldn't she?

November: This is credibility. But let's assume that somebody reaches her. She says no. And I say to her do you recall that you came and said to me, and said Jules or Mr. November, I feel terrible here's what Moss is going to do. I don't want to be a buffer, and I said to you well you know you're keeping company with the man, would you give me a statement? She says, she thought she said, yes, I'll be glad to give you a statement. Understand, that's what this is for, don't you understand? But if he got wind of the fact, that she's gonna testify to the relationship. (Inaudible). He's destroyed if he's cross-examined on this shit.

Ostrer: But he went down there [to the U.S. Attorney] today right?

November: That's what he said.

Ostrer: He probably gave them a statement under oath.

November: I don't think he gave it to them under oath. I don't think so.

ment, but to retain it for later use. Ostrer question November whether this was blackmail or intimidation of a witness and November assured him that it was not.

Ostrer: He told her he's gotta be a witness.

November: Aw well that's language she doesn't understand he's got to be. He don't have to be. But I think he's destroyed, but as you say, what you also got the other thing on him, he gave back the stock. . . .

. . . . . .

Ostrer: You're playing with fire.

November: You play with fire. It's dangerous here you're intimidating, you're extorting, in other words, if a guy has something against me, and he says November you know, if you don't do so and so I'm gonna do so and so, then you commit, you can't do that. That's why I purposely left him out. He was he was a party to the whore. . . . He's married? He was a party to this whoremastery too. But she said he didn't take anybody. Chicago he took her up to (inaudible) he gave her that set (inaudible), a color set (inaudible). Because I said you got to be careful, you can't make it too vivid or people will say to you, what are you a girlfriend of Mr. Ostrer, you follow me? Now I put in there that, it ran over, you know what I mean, she saw later that the man was running away with himself. He's destroyed. Here's that, here's that, the jury will say he's a fuckin' whoremaster.

. . . . . .

Ostrer: That's, that's, credibility of a witness you say?

November: Anything that tends to show credibility. The Court of Appeals has ruled time and time again, anything that (inaudible)

Kilroy: Louie, pick up the phone.

November: He's a whoremaster.

Ostrer: Hello, Hello.

November: He's a (inaudible). He's a cheater. Any may who is a whoremaster, a cheater, a man of disrepute, is not worth a, anything that shows he's a (inaudible).

Ostrer: Why don't you keep a copy?

Kilroy: I don't want a copy.

November: No, don't give him a copy (inaudible).

Kilroy: As far as I am concerned, there was no copy made (inaudible).

November: You can keep a copy, give him the original.

Kilroy: Who do you want the other copy to go to?

November testified that he had never tried a criminal case in federal court. I believe this to be true. Attorneys familiar with federal practice in criminal cases would realize the unavailability of this information for impeachment purposes. Indeed, Mr. Edelbaum testified (Tr. pp.358, et seq.) that, under the then prevailing rulings on evidence, he did not believe that an accusation of adultery could be used in this District to impeach a witness. In this he was correct.

While Rule 608(b), F.R.Evid. might suggest a different rule, at the time of Ostrer's trial the rule was as explained in *United States* v. *Semensohn*, 421 F.2d 1206, 1208 (2d Cir. 1970):

November: (Inaudible) put it away in the safe in case something happens. Alright? Don't tell Edelbaum about it till it comes up, at that point if you find out Moss, you didn't get a bill of particulars, I knew you couldn't get that anyway. You tell Edelbaum that that he's gonna have Suzy as a witness and that Suzy voluntarily, you know, is gonna be a witness, that she gave you a statement, give him a copy of it.

. . . . . .

November: Nah. I don't think he takes the stand, what do you think of that?

Ostrer: How do you get to him to let him know you got this?

November: Well, then, in that case, I guess, you see, (inaudible) let's hear what he talks to her about tomorrow.

Ostrer: Cause we got to be very, very, very, careful with this.

November: Yeah, she may then later on tell him, listen, if you gonna take stand, Aubrey, you hear.

Ostrer: Yeah, go ahead.

November: Then so as a decent human being, no matter what it could do to me, I have got to show what a low skunk you are. Follow me?

Ostrer: Yeah, go ahead.

November: I don't think he's gonna take the stand. What do you think of that? You've got dynamite here, as you put it yourself. Now we have to talk at length here probably Friday or Monday, (inaudible)."

> "It is settled that in a trial a witness's acts of misconduct are not admissible to impeach his credibility unless the acts resulted in the obtaining of a conviction. It is also settled law that a conviction does not become a final conviction until a sentence has been imposed and until the time for an appeal from the judgment has expired."

There are many cases to the same effect. They include *United States* v. *Nuccio*, 373 F.2d 168, 171 (2d Cir.), *cert. denied* 387 U.S. 906 (1967), affirming a conviction where a defendant was precluded from cross-examining a witness as to homosexuality to impeach credibility. The Court held:

> "Weighed against the rather slight probative value, the adverse effect of such evidence in improperly discrediting and embarrassing the witness justified the trial court in excluding it. See Wigmore, Evid. §951 (1940 ed.)."

See also, *United States* v. *DeSapio*, 456 F.2d 644 (2d Cir.), *cert. denied* 406 U.S. 933 (1972), [witness Itkin's subornation of perjury, absent a conviction, not admissible for impeach ment of general credibilty]; *United States* v. *Bowe*, 360 F.2d 1 (2d Cir.), *cert. denied* 385 U.S. 961 (1966), [witness called to testify that chief Government witness asked him to participate in plan to blow up Statue of Liberty]; *United States* v. *Glasser*, 443 F.2d 994 (2d Cir.), *cert. denied* 404 U.S. 854 (1971), [prior criminal acts not resulting in a conviction may not be made the subject of direct proof]. In sum, we believe, with Edelbaum, that the trial judge would have precluded any inquiry on cross-examination as to Moss' adulterous relationship with Gold, and are certain that any direct proof, through testimony of Gold as to that misconduct would have been

excluded. If the possible coercion inherent in delivery of Gold's statement to Moss' wife or children would have inhibited Moss, the prosecutor had adequate counter forces, including the power to confer use immunity on Moss (18 U.S.C. §6000, et seq.), and compel him to testify truthfully by the power of civil contempt, and the threat of prosecution for false statements. 18 U.S.C. §1623.

Even under the more liberal New York state practice, where such inquiry of the witness would be permitted for impeachment on cross-examination, instances of prior misconduct are collateral matters not provable by extrinsic evidence. See *People* v. *Webster*, 139 N.Y. 73, 83-85 (1893); Richardson on Evidence, §510 (9th ed.).

Lastly, what good is the Gold statement? In these times of recorded and widely publicized Presidential and Congressional adulterers, massage parlors with neon signs, and street corner pandering, which claims constitutional protection, we suspect that many of our jurors selected within a fifty mile radius of Foley Square are licentious, or have friends who are. Moss neither raped nor seduced Miss Gold; the activities of these mature consenting adults would not, in our view, if known to the jury, impeach any witness. November cannot realistically have believed otherwise.

Subsequently, in a recorded telephone conversation on November 30, 1972, from Ostrer's office, Susan Gold told Moss that she did not want to "see" him until the federal trial was concluded. Miss Gold accused Moss of turning unfairly against his friend Ostrer, and a discussion of financial losses that Moss had suffered in transactions with Ostrer ensued. Toward the end of this conversation, Ostrer returned to the office, discovered that Miss Gold was on the telephone with Moss, and instructed her to hang up.

In other recorded conversations, Ostrer had voiced his concern that people with whom he was associated should be

careful in their dealings with Moss, since he might be recording any conversations with them.

Subsequent Actions of the D.A.'s Office.

Detective Walter Finley, an officer who was on duty at the monitoring plant on November 21, 1972 and overheard the Ostrer-November conversation, concluded that he was listening in on preparations to commit a crime. Finley was not aware that November was an attorney, and there is little in the substance or tenor of that conversation to suggest to an eavesdropper that this was a conference between an attorney and client. Concerned that there might be an attempt afoot to commit the state crime of Coercion, Finley discussed this information with his fellow officer at the monitoring plant, and with his supervisor. They then reported it to Assistant District Attorney John Fine, who was in charge of the D.A.'s investigation. Fine was aware that November was an attorney, but nevertheless believed that the intercepted communication was evidence of preparation for a criminal act.[8]

Defendant contends that the November 21st conversation does not demonstrate a plan to coerce Moss or to obstruct justice, and that subsequent intercepted conversations indicate, to the contrary, that Ostrer did not want any contact with Moss. Furthermore, defendant contends that the November 21st conversation must be understood as an innocent effort to prevent Moss from testifying falsely against Ostrer, and, rather than an obstruction of justice, any confrontation with Moss would have been designed to prevent Moss from testifying falsely.

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[8] We observe that "[a]ttorneys, unlike Calpurnia, are not necessarily always above suspicion." *United States* v. *Tramunti*, 513 F. 2d 1087, 1103 (2d Cir.), *cert. denied* 44 U.S.L.W. 3201 (October 7, 1975).

Section 135.60 of the New York Penal Law provides in relevant part that:

> "[a] person is guilty of coercion in the second degree when he compels or induces a person . . . to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will: . . . [e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule."

See also, 18 U.S.C. § 1503; *United States* v. *Cioffi*, 493 F. 2d 1111, 1118-19 (2d Cir.), *cert. denied* 419 U.S. 917 (1974).

No evidence appears in this record that Ostrer, November or persons associated with either of them actually attempted to intimidate or coerce Moss, and apparently, to the extent, if any, that a criminal act may have been contemplated, the plan never passed the discussion stage.

Ostrer contends that the November 30th Gold-Moss telephone conversation, suggests that there was no plan to intimidate Moss. The inference, if any, to be drawn from this conversation is not so unequivocal. The same officer, hearing both the November 21st and November 30th conversations, would not necessarily conclude from what Gold said, that the plans which Ostrer and November had discussed had been abandoned.

Whether Ostrer, November or both of them actually violated federal or state law, or really planned to do so, need not be determined here. For our purposes, it is sufficient, and I find, that state law enforcement authorities believed in good faith that a criminal act to obstruct the federal prosecution

appeared to be in preparation. Also, there was a reasonable basis in fact for their holding this belief.[9]

On December 22, 1972, State Supreme Court Justice Jacob Grumet signed an amended order authorizing the continuation of electronic surveillance by state authorities (Ex. C). The amended order stated that there was now reasonable grounds to believe that evidence of Coercion in the first degree might be obtained through continued surveillance. In support of the state's application, Detective Finley submitted an affidavit reciting, among grounds for the expanded and continued surveillance, the Ostrer-November conversation of November 21, 1972.

COMMUNICATIONS BETWEEN STATE AND FEDERAL PROSECUTORS.

Assistant District Attorney Fine was reasonably and properly concerned about what appeared to him to be the coercion of a prospective federal Government witness. On December 21, 1972, in the ordinary and regular course of his duties, Fine discussed the substance of the November 21, 1972 conversation with then Chief Assistant District Attorney Alfred Scotti, who also served as head of the D.A.'s Rackets Bureau. Fine told

[9] Defendant contends that, since neither federal nor state authorities later initiated prosecution of criminal charges based on this conversation, they did not entertain a good faith belief that the plans discussed were unlawful. The Assistant United States Attorney who tried this case testified that there were discussions within the United States Attorney's Office whether an indictment should be sought for violation of 18 U.S.C. § 1503 [the federal obstruction of justice statute]. They concluded that, at most it was an attempted obstruction of justice. As a result of the discussion, it was determined that such a prosecution would be a poor allocation of resources because Ostrer was already convicted on the instant charges, and the case would be difficult to prove. That a prosecutor, in the proper exercise of his discretion, ultimately decided not to prosecute does not imply that there was no reasonable basis for an investigation of suspected criminal activity.

Mr. Scotti that there was an attempt to tamper with a federal Government witness by scaring him into giving testimony that would not be favorable to the Government, at the risk of having his adulterous relationship exposed.

Scotti and Fine agreed that the exertion of pressure of this nature upon a witness was improper. The state prosecutors concluded that they had a duty to alert the federal prosecutors so as to prevent an obstruction of justice. Scotti and Fine did not discuss recommending any course of action for the United States Attorney to pursue.

Although the state prosecutors determined that duty compelled their disclosure of the substance of their information and knowledge to federal authorities, they were equally concerned about maintaining the security of their investigation, and, in particular, the confidentiality of their electronic surveillance. Fine was under the wrong impression that an investigator employed by Ostrer [Lynch] had some current relationship with federal authorities. Scotti instructed Fine to advise the United States Attorney of the substance of the information without disclosing its source.

The D.A.'s people had an overriding interest in the protection of the secrecy of their surveillance. With reason, they regarded the United States Courthouse as a leaky ship. See, for example, *In re Biaggi*, 478 F. 2d 489 (2d Cir. 1973), in which "authoritative sources" revealed the contents of secret grand jury proceedings in this District to a newspaper. They [he] did so with impunity. And in *United States* v. *Rosner*, 485 F. 2d 1213, 1217 (2d Cir. 1973), *cert. denied* 147 U.S. 950 (1974), a seasoned criminal practitioner concluded that a source in the federal prosecutor's office could, for money, supply helpful information. The Court of Appeals described what took place:

> "Rosner said he wanted 3500 material. Rosner told Leuci that he understood that there were four witnesses in the case and that 'two were good and two are bad,' and that he 'would like to find out what two are good and what two aren't good.'
>
> Leuci told Rosner that although his contact had not yet established a price for the information Rosner wanted, Leuci 'would appreciate it if something were done' for his 'contact' in the United States Attorney's office, 'as soon as possible.' Rosner and DeStefano stepped away from the table and Leuci saw Rosner pass DeStefano some money. When they returned to the table DeStefano passed Leuci $400 under the table."

In the *Rosner* situation, those purporting to sell secret information were acting in an undercover capacity, but the fact that defendant there fell for their little act suggests such occurrences were not unheard of.

It was reasonable for Scotti and Fine to seek to discharge their perceived duty without risking the compromise of their own continuing efforts.

At the conclusion of their discussion, Mr. Scotti attempted to arrange a meeting between Fine and the Assistant United States Attorney in charge of the federal prosecution. Scotti first telephoned the United States Attorney for the Eastern District and was informed that Ostrer was not being prosecuted in that District.[10] Scotti then called then Chief Assistant United States Attorney Silvio Mollo, of this District. Scotti told Mr. Mollo that an Assistant District Attorney had information that would be of interest to the Assistant United States Attorney on the Ostrer case. Scotti did not mention that the information involved a Government witness named

[10] The limited meaning and effect of the surveillance is shown by the fact that the D.A.'s Office did not even know where the case was pending.

Moss, nor that the source of his information was electronic surveillance.

Mr. Mollo conveyed this message to Assistant United States Attorney Harold McGuire, who was then in charge of the prosecution of Dioguardi and Ostrer, and instructed him to call Assistant District Attorney Fine because Fine had information relevant to the federal case. McGuire made an appointment to meet Fine in Fine's office the following day.

At the December 22nd meeting, Fine told McGuire, in substance, that Ostrer had certain information regarding Moss, and expressed his fear that this information would be used to effect an obstruction of justice. McGuire testified, and I find that Fine did not venture a recommendation concerning what McGuire should do with this information, since it was apparent that Fine did not know anything about the federal case. McGuire told Fine that he did not have to worry about an obstruction of justice, because it was not McGuire's present intention to call Moss as a witness, at least, not as part of the Government's direct case.

McGuire had previously read Moss' August 13, 1970 testimony before the Securities and Exchange Commission ("SEC") and his March 13, 1971 testimony before a federal grand jury. McGuire also interviewed Moss at the United States Attorney's Office on November 21, 1972.[11]

Moss had testified previously that he did not know that the price of the stock of Belmont was being manipulated, and had invested in it on Ostrer's advice, because he believed that Belmont was a good investment. McGuire, familiar with Belmont and its meteoric price history, did not believe Moss'

[11] A subpoena to appear as a Government witness, dated November 30, 1972, was served on Moss. (Ex. 12). This service was effected on December 20, 1972, and Moss continued to be under subpoena throughout the federal trial. McGuire did not interview Moss again after November 21, 1972.

testimony, and determined that Moss would not be helpful as a Government witness. McGuire reached this conclusion independently and prior to meeting with Fine or being informed that there appeared to be an effort to intimidate Moss.

Fine did not disclose that the information regarding Moss had been obtained from electronic surveillance or from a conversation between Ostrer and November.[12] Fine testified that he believed that McGuire inquired of him as to the source of this information, but that Fine declined to disclose his source. Before ending their discussion, Fine encouraged McGuire not to do anything differently in the preparation of his case. Fine's unstated reason for this advice was that he did not want to alert the federal defendants, or any of the additional subjects of his own investigation, to the existence of the electronic surveillance.[13]

Detective John O'Rourke, one of the police officers present for at least part of the meeting between Fine and McGuire, testified that Fine told McGuire that there was a security problem within the United States Attorney's Office because Jim Lynch, who was or had been an FBI Agent, was associated with Ostrer. McGuire did not recall that he was informed of this by Fine. Lynch's employment had no bearing on the issues in Ostrer's trial, and knowledge of the fact that Lynch was associated with the Ostrer defense was not used by the Government to Ostrer's detriment, nor could it be.

Before concluding his discussion with Fine, McGuire asked whether Fine was in possession of any material that would be useful for the cross-examination of Ostrer. McGuire did not succeed in gaining information useful for this purpose, other than to obtain a certified copy of Ostrer's prior state judgment of conviction and the transcript of his plea to those charges, both matters of public record.

[12] McGuire did not know that November was the source of this information. McGuire certainly knew that November was an attorney. See *November* v. *Time, Inc.*, 13 N.Y. 2d 175, 244 N.Y.S. 2d 309, 310 (1963), a defamation case in which McGuire was an attorney for the defendant.

[13] The purpose of doing this was to prevent anything which would compromise the wiretap.

Following the meeting with Fine, McGuire instructed an SEC investigator to contact Moss to be certain that Moss was under subpoena for the trial. Fine's diary entry for December 29, 1972 (Ex. B) shows that on that date Fine telephoned McGuire to inquire whether Moss was under subpoena for the Belmont trial. Fine recommended that the subpoena remain in effect. McGuire was willing to keep Moss under subpoena to accommodate Fine, and because he could not be certain that some circumstance might not develop at trial making Moss' testimony significant. Furthermore, McGuire testified, and I find, that he wanted to conceal the fact that Michael Hellerman, a co-conspirator and co-defendant on this indictment, would testify and be the lynchpin of the Government's case. There was no further contact between state and federal law enforcement authoritites prior to the federal trial.

On February 21, 1973, after a verdict was returned in this case, the state authorities terminated surveillance and searched Ostrer's office pursuant to a warrant. On April 18, 1973, Fine and McGuire conferred again. Then, for the first time, Fine informed McGuire of the electronic surveillance, and that the information regarding attempted coercion of Moss had been obtained from an intercepted conversation between Ostrer and November.

THE TRIAL.

On January 4, 1973, the trial of Dioguardi and Ostrer on this indictment began before Chief Judge Edelstein of this Court and a jury. A full exposition of the facts adduced at trial appears at 492 F. 2d 70 (2d Cir. 1974) with which familiarity is assumed. We discuss the evidence below only with regard to the case proved against Ostrer.

The case against Ostrer was presented primarily through the testimony of Hellerman, the chief manipulator in the Belmont scheme. Hellerman described the scheme by which the price of Belmont was to be manipulated from $5.00 or $6.00 per share in January 1970 to approximately $50.00 per share in May of that year. Hellerman testified that he offered Ostrer the opportunity to buy a portion of the Belmont stock issue at $15.00 per share, with the understanding that Hellerman would receive one-half of the profits and would guarantee Ostrer against any loss. Ostrer committed himself to purchase 14,000 of the approximately 28,000 outstanding shares at a cost of $210,000.00. Hellerman made arrangements to have others purchase the remaining 14,000 shares.

The other individuals whose participation Hellerman secured were able to pay for their shares, but Ostrer was unable to raise the $210,000.00 that he had committed himself to raise, and the selling brokers were waiting for his payment. Hellerman arranged, through Dioguardi, for Ostrer to borrow $60,000.00 from an organized crime figure, one Hickey DiLorenzo, at 1½% interest per week. Hellerman himself advanced Ostrer over $52,000.00 to cover Ostrer's obligation on 3,500 shares of stock. Ostrer, still having difficulty raising the balance that he owed on these shares, sought other financial sources.

Hellerman testified that Ostrer had mentioned several people to whom he was attempting to sell a portion of his allocated shares. One of the persons mentioned who was considering purchasing a portion of Ostrer's commitment was Aubrey Moss.[14] Hellerman, on cross-examination by Mr. Edelbaum, Ostrer's trial counsel, testified that he understood

[14] Some indication of the peripheral importance of Aubrey Moss to this case is that Hellerman, the prime mover in this scheme, identified Moss as "Harry Morse" (Trial Tr. p. 815), Hellerman did not know first-hand whether Moss had purchased a portion of Ostrer's shares, or on what terms.

Ostrer had an agreement with Lee Evins to purchase a portion of Ostrer's allocation, and that Ostrer would guarantee Evins against loss, and would share in Evins' profits. Hellerman also testified that Ostrer had an agreement with Fred Flatow for the purchase of shares.

In May 1970, the manipulation scheme failed when, without notice to the manipulators, the President of Belmont sold his "investment" stock through non-participating brokers. The market was unable to absorb this influx of shares. Hellerman was unwilling to purchase the shares himself, and unable to find other purchasers at the now inflated price. The market for Belmont stock collapsed, and Ostrer and others were left with considerable losses.

Ostrer attempted to hold Hellerman responsible for his losses, and Dioguardi subsequently arbitrated their dispute.

Ostrer contends on this motion that had Moss testified as a Government witness, his testimony on cross-examination would have been helpful to the defense, and that but for the intrusion on his conversations with counsel, the Government would have blundered into calling Moss as a witness.

Moss would have testified that he purchased 2,000 shares of Belmont stock from Ostrer for $30,000.00 with the agreement that he and Ostrer would split the profits "50-50" and that Ostrer would hold Moss harmless against any loss. Prior to trial, Mr. Edlebaum had seen a copy of a written agreement memorializing this understanding between Moss and Ostrer. Mr. Edelbaum testified at the evidentiary hearing that, if Moss were a witness, Edelbaum would have laid a proper foundation for the admissibility of the written agreement. Ostrer suggests that this evidence would have cast serious doubt upon the truthfulness of Hellerman's testimony, in that it would have demonstrated that Ostrer had agreed to give half of his profit to Hellerman and the other half to Moss, leaving Ostrer with no share in the fruits of the conspiracy. It is contended

that Ostrer's arrangements with Evins and Flatow were similar in all respects to the arrangements with Moss.

In fact, at trial, the Government did not call Moss or Evins as a witness; Flatow had died prior to the trial. Ostrer now claims he was faced with a dilemma whether to call Moss, Evins or both as defense witnesses.

Mr. Edelbaum testified that he had decided against calling Moss as a witness for the defense for two reasons. First, Mr. Edelbaum did not trust Moss, based upon (1) Edelbaum's impression of Moss' demeanor in a pre-trial meeting with Moss in Edelbaum's office, and (2) the fact that Edelbaum had been told that although Moss had made statements consistent with Ostrer's innocence, he had made other statements indicating that he bore a grudge against Ostrer. Furthermore, Edlebaum knew that Moss had testified about Ostrer before the federal grand jury, but did not know the substance of that testimony. Edelbaum realized that if he called Moss as his own witness, he would not have access to the grand jury testimony but that if the Government called Moss, all his prior statements and secret grand jury testimony would be available to him on cross-examination. 18 U.S.C. § 3500.

The latter reason applied with equal force to Evins who had also testified prior to trial in the grand jury.

No application was made to have the Court call Moss as a Court witness.[15] It also appears that no effort was made to authenticate, and thereby render admissible, the Ostrer-Moss written agreement by proffering the testimony of persons familiar with the signatures of Ostrer and/or Moss, or the

[15] Although rarely invoked, the Court, in its discretion, may call a person as a court witness. See Rule 614, F.R. Evid., which is declaratory of pre-existing law. Although Rule 607, F.R. Evid., now relieves the proponent of a witness' testimony from "vouching for" its credibility, the rule in this District was otherwise when this case was tried.

testimony of a handwriting expert.[16] Finally, the record does not indicate that there was any request for the Government to stipulate to the authenticity of the written document without there being a foundation laid by live testimony.

As noted earlier, on January 26, 1973, following more than two days of deliberation, the jury found Ostrer guilty on eleven of the counts submitted to it for its deliberation, acquitting him as to six counts.

THE FOURTH AMENDMENT CLAIM.

It has been stipulated for purposes of this motion that the surveillance conducted by state law enforcement authorities was in violation of Ostrer's Fourth Amendment rights. Although the constitutional invalidity of this eavesdropping is not in dispute, it is worth noting why it was unlawful.

On February 4, 1975, after Ostrer's federal conviction, in *People* v. *Brown*, (Ind. No. 1392/1973, Sup. Ct., N.Y. County, Pt. 42), a New York state court held that prior wiretap and eavesdropping orders for the residences of Anthony Salerno and Joseph Moretti, issued on August 30, 1971 had been granted absent an adequate showing of probable cause. The conversations intercepted during this Salerno-Moretti surveillance had served as the basis upon which a number of further eavesdropping warrants, including the warrant for Ostrer's office, were granted. Thus Ostrer's wiretap and all it disclosed was "fruit of the poisonous tree." *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

[16] The document might have been authenticated by either course. McCormick on Evidence § 221 (1972); see also Rule 901, F.R. Evid., and Advisory Committee Notes. The relevance of the document should have been apparent on its face.

As we have found, Fine did transmit information to McGuire that he derived from the eavesdropping on Ostrer's conversations later found to be unlawful. Cooperation between state and federal law enforcement officials is contemplated by both federal and state statutes, 18 U.S.C. § 2517 and N.Y. Criminal Procedure Law § 700.65, and acting upon the justified supposition that the surveillance was conducted lawfully pursuant to warrants, the communications between the two prosecutors were proper. See *United States* v. *Manfredi*, 488 F. 2d 588 (2d Cir. 1973), *cert. denied* 417 U.S. 736 (1974); *United States* v. *Forlano*, 358 F. Supp. 56 (S.D. N.Y. 1973). Under these circumstances, where one prosecuting authority had reason to believe that there was an attempt to tamper with a witness in a prosecution in another jurisdiction, such communications are essential and should not be discouraged. The scope and extent of the communication were severely limited to that sufficient to satisfy the necessities.

The issue upon this motion is to what extent, if any, did the unlawful state surveillance taint the federal prosecution. Defendant must bear "the initial burden of producing specific evidence demonstrating taint in a substantial portion of the Government's case against him," although the Government "has the ultimate burden of persuasion to show that its evidence . . . was not tainted through a connection to the illegally procured wiretap information." *United States* v. *Sapere*, 531 F. 2d 63, 66 (2d Cir. 1976). See also *Alderman* v. *United States*, 394 U.S. 165, 183 (1969). For reasons to be elaborated further below, the Court finds that the defendant has failed to satisfy the initial burden, and, even if it were to be assumed, solely for the argument, that he has made the requisite showing, the Government has amply demonstrated that the trial was conducted and that the evidence upon which Ostrer was convicted was derived "by sufficiently different or distinguishable means to be pure or

'purged'" of the primary taint. *United States* v. *Sapere*, *supra*, at 64, n. 1. See also *Wong Sun* v. *United States*, *supra*, at 487-88.

THE SIXTH AMENDMENT CLAIM.

Defendant claims that by means of this unlawful surveillance, the Government intruded upon his attorney-client relationship with November, and thereby violated his Sixth Amendment right to the effective assistance of counsel in the federal trial. Defendant urges this Court to apply a *per se* rule against which this conviction could not stand. See *Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S 345 (1967).

However, the application of such a *per se* rule has been reserved for those instances where the conduct of the Government has been "manifestly and avowedly corrupt." "The *per se* rule represents a moral as well as a legal condemnation of such egregious and unequivocal conduct for which sanctions are imposed against the Government as punishment regardless of the defendant's guilt." *United States* v. *Gartner*, 518 F. 2d 633, 637 (2d Cir. 1975).

The circumstances surrounding this intrusion do not suggest that the federal Government or the D.A. has acted culpably. What occurred here was not a purposeful intrusion designed to infiltrate the defense camp and spy on its strategies. To the contrary, this was an incidental intrusion by state authorities completely unfamiliar with this federal prosecution.

The acutal intrusion was committed by state authorities, acting pursuant to a warrant signed by a state judge, and believing that an adequate showing of probable cause had been made. In fact, there may have been an adequate showing of probable cause, however the predicate for that showing was derived from prior unlawful surveillance of others.

The initial eavesdropping on Ostrer was by a detective who did not know that one participant was an attorney, or that the attorney was acting for Ostrer in this matter. Although Assistant District Attorney Fine knew that November was an attorney, he believed that November was engaged in a criminal act.

Under familiar principles of law, the counselling of the commission of a crime or fraud is not encompassed by the attorney-client privilege.[17] Fine disclosed to Assistant United States Attorney McGuire only the minimum information necessary to avert the perceived obstruction of justice.[18]

The state authorities proposed the meeting without suggesting that their investigation was electronically derived, or involved an attorney. At the time they neither knew nor had reason to know that the Ostrer eavesdropping warrant was invalid.

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[17] "Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme. Advice given for those purposes would not be a professional service but participation in a conspiracy. Accordingly, it is well settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud." McCormick on Evidence § 95, at 199 (1972).

[18] Ostrer contends that there was significant intrusion upon his strategy sessions with November. I decline to so find. To the extent that strategy was overheard, there is no evidence that there was a massive transmission of defense strategy to the federal prosecutor. Although in at least one intercepted conversation there was a discussion of whether Ostrer would testify, and the conclusion expressed that in a jury trial he could not, this was apparently not discussed by Fine and McGuire, since McGuire was still seeking information from state public records for the cross-examination of Ostrer on his prior convictions. All that Fine told McGuire out of all of this was to watch out because they were trying to coerce "Morse."

The state authorities were motivated solely by a high-minded sense of ethical obligation to insure proper and unobstructed administration of federal criminal justice. McGuire did not know that this information was derived either from electronic surveillance or from a privileged communication between attorney and client. See generally *United States* v. *Brown*, 484 F. 2d 418 (5th Cir. 1973), *cert. denied* 415 U.S. 960 (1974).

The Court has had an opportunity to listen to and observe the demeanor of the witnesses upon this hearing, specifically, McGuire, Fine, Mollo, Scotti and Edelbaum. The Court regards these witnesses as high-principled and truthful men. Essentially, defendant's motion is founded on suspicion, not borne out by facts. If everything which the D.A.'s policemen did record or could have recorded which occurred in Ostrer's office prior to verdict had been transmitted fully and immediately to McGuire, our view of this motion would be different. But it wasn't. Instead, all that McGuire was told by the D.A.'s people was that Ostrer and others were trying to tamper with the federal witness "Morse." He was not told how, nor how the D.A. knew. There was no basis for McGuire to infer that the information was derived from electronic surveillance, much less that it came from illegal or tainted sources. Indeed, usually such material comes from confidential informants. While McGuire, now a private practitioner, is apparently indignant that Ostrer still walks the street, this bias or attitude did not color his testimony and I find him a truthful witness.

The *per se* rule is regarded as a rule of deterrence against Government lawlessness. As the Supreme Court had noted in a different context,

> "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

At each step in this limited transmission of information, the official action, state and federal, was pursued in complete good faith. There is no single act of misconduct or negligence, repetition of which must be deterred; rather, a rule of deterrence would only serve to chill necessary communications between state and federal law enforcement authorities. Under the circumstances of this case, application of the *per se* rule would be undesirable and inappropriate.

In the absence of any evidence that the Government engaged in misconduct warranting the imposition of the sanctions inherent in the *per se* rule, the Court must consider and determine whether the defendant was in fact prejudiced by this intrusion.

The Claims of Prejudice.

The prejudice claimed here is not what occurred at trial, but rather what did not occur; not in the evidence that was presented, but in the fact that Moss was not called as a Government witness.

Ostrer contends that but for the intrusion on his conversation with November, the Government to its tactical detriment, would have called Moss as a witness on its direct case. This contention is contradicted by the credible testimony of McGuire and Fine that, even prior to their meeting, McGuire had decided that it would not be necessary or desirable to call

Moss as a witness. On the basis of Moss' prior testimony and McGuire's own interview, McGuire determined that Moss was not being truthful and would be a dangerous witness.

All that the Government could hope to achieve through the testimony of Moss was established by the credible testimony of Hellerman.

Ostrer contends that following Hellerman's cross-examination, the Government's case was in jeopardy, and that, if McGuire had not been counselled otherwise by Fine, McGuire would have reconsidered his trial strategy, and called Moss to bolster the Government's case. McGuire testified, and I believe, that nothing occurred to change his trial plans, and the jury's verdict bears out McGuire's assessment. We, therefore, find that McGuire did not rely upon Fine's information in deciding not to call Moss as a witness, or in adhering to his prior decision not to do so.

Assuming solely for the argument, that McGuire reached his decision not to call Moss based upon Fine's information, any prejudice to Ostrer was not such as to warrant a new trial. As noted previously, the defense could have called Moss as a witness, or requested the Court to do so. Mr. Edelbaum testified perceptively to the dangers to Ostrer of calling Moss as a defense witness. Assessing these dangers, as against any likely benefit to result from Moss' testimony, Mr. Edelbaum exercised the wise professional judgment attained by more than forty-five years of active and successful criminal defense experience.

This renowned advocate concluded that calling Moss as a defense witness was too perilous. Instead, Mr. Edelbaum cross-examined Hellerman about the agreement with Flatow and Evins, and impliedly, Moss. His strategy was well thought out and, in all respects, professionally executed. In another exercise of defense strategy, Ostrer elected not to testify in his own defense. Mr. Edlebaum's judgment is not to be maligned simply because his client was convicted.

Furthermore, Moss' testimony would not necessarily have been exculpatory of Ostrer. Just as McGuire believed that Moss was not being truthful in stating that Ostrer did not tell him that Belmont stock was being manipulated. so Ostrer, November and Edelbuam each feared that Moss would falsely inculpate Ostrer. In recorded conversations, Ostrer speaks generally of the need to discredit Moss' testimony (Exs. T-2, K).

We assume that Moss would have testified that he purchased 2,000 shares pursuant to a written agreement that he and Ostrer would share profits "50-50" and that Ostrer would guarantee him against loss. Proof of such an agreement would compel the inference that Ostrer had reason to believe that there would be no loss. In view of the already inflated price at which Belmont was selling, this inference would be consistent with the Government's theory, and suggest that the stock was being manipulated, and Ostrer knew it. Why else would he, as an experienced businessman, sign such a paper?

The "50-50" provision of this agreement, when considered together with a similar agreement with Hellerman, would have demonstrated that Ostrer gave up all profit, but did so only as to these 2,000 shares, and presumably the 4,000 shares sold to Evins and Flatow under similar terms. According to the testimony of Hellerman, Ostrer had committed himself to purchase 14,000 shares. Ostrer was able to raise enough money to control approximately 8,000 shares. Since the success of the manipulation depended upon control, by the conspirators of all the outstanding shares, it was imperative that the remaining shares be purchased; if not by Ostrer himself, then by persons who would follow his instructions. To park these shares, and insure the success of the entire manipulation, and to protect his share of the profit in 8,000

shares, Ostrer could well afford to forego all his participation in profits on the other 6,000 shares and indemnify losses.

Ostrer could agree to hold his purchasers harmless because the terms of his agreement with Hellerman provided him with indemnification against loss. Thus, although Moss' testimony certainly would have been relevant, it may not have exculpated Ostrer in the minds of the jurors. Rather, it might have shown guilt.

To summarize in this regard, defendant has failed to demonstrate that the unlawful surveillance or the intrusion upon his privileged communications tainted this prosecution. Primarily, this is so because only the most limited product of the surveillance, i.e., that they were planning to tamper with Moss, passed from the D.A.'s people to the federal prosecutor.

Before December 22nd, McGuire had determined independently not to call Moss as a witness. To the extent, if at all, that Fine's information confirmed McGuire's preconceived decision not to call Moss, or to the extent, if at all, that McGuire resisted the temptation to call Moss as a witness after the cross-examination of Hellerman, I find that the defendant was not prejudiced. If we are to assume that Moss was to provide affirmative evidence for the defense, the defendant could have called Moss, or introduced the written agreement or done both.

Merely because the defendant was faced with a difficult strategic choice, the implications of which were well known to defense counsel, does not mean that the Government's conduct deprived Ostrer of a fair trial.

The Government evidence actually adduced at trial was not derived from the unlawful surveillance, nor from the intrusion upon any attorney-client conversation. The proof against Ostrer was substantial, if the jury found the testimony of Hellerman credible, as indeed it must have done in order to have returned these guilty verdicts.

EFFECT OF THE TESTIMONY OF MOSS.

Defendant has styled this motion as a motion for a new trial based upon newly discovered evidence. The newly discovered evidence is the fact of unlawful state surveillance, followed by a state-federal conversation. Were we to consider Moss' testimony itself as the "new evidence" basis for this motion, rather than the circumstances surrounding the surveillance, we find no merit to this motion.

> "To succeed on such a motion a defendant must show, inter alia, (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict." *United States* v. *Slutsky*, 514 F. 2d 1222, 1225 (2d Cir. 1975).

Moss' testimony fails to satisfy these criteria. The defense knew of the agreements between Ostrer and Hellerman and between Ostrer and Evins, Flatow and Moss prior to trial. Moss and the written agreement were available to the defense.

It can hardly be said that Moss' testimony would have produced a different verdict. As previously noted, Moss' testimony regarding the agreement, rather than refuting Hellerman's testimony, was consistent therewith, and also consistent with the Government's theory of the case.

BAIL PENDING FURTHER PROCEEDINGS.

Initially, the Court believed that defendant was and continues to be enlarged on bail pending determination by the District Court of this motion for a new trial, pursuant to an

order of the Court of Appeals dated December 17, 1974. The aforementioned Court of Appeals order continues bail for "24 hours after a decision by the United States District Court on the motion for new trial, or until the next panel of this Court is available to hear any subsequent bail application, whichever is the later of those two dates."

This portion of the December 17th order is somewhat puzzling. Mr. Dershowitz, defendant's counsel on this hearing stated (Tr. p. 514), "I take it is still open under the Court of Appeals ruling, whether to grant or deny bail in the event that the motion is turned down. . . ."

Apparently, the Government disagrees, and presumably bases its disagreement upon reasoning based upon the rule found in footnote 11 of *United States* v. *Ellenbogen*, 390 F. 2d 537, 541 (2d Cir.), *cert. denied* 393 U.S. 918 (1968). See *United States* v. *Rosa*, 372 F. Supp. 1341 (S.D. N.Y. 1974) for detailed discussion of the *Ellenbogen* rule, which this Court believes would be abrogated by our Court of Appeals upon a re-examination. Alternatively, the Government may regard the order of December 17th as "law of the case," and reads into it an implied negative, to the effect that the trial court could not continue the bail beyond the 24 hour period, or the availability of the next panel, whichever is later.

I conclude that the District Court has jurisdiction to enlarge Ostrer's bail pending appeal from this order, and also has jurisdiction to deny bail, subject only to the fact that such denial would be stayed for the 24 hour period.

Addressing the merits of Ostrer's desire for bail, it seems appropriate that he should continue to be enlarged pending appellate finality.

First, in connection with this non-violent crime, Ostrer has at all times honored the terms and conditions of his bail, and has made himself available whenever required, during a period of almost five years since this indictment was filed. His

attendance at court before me at required conferences prior to the hearings, and also during the hearings, was prompt, regular and orderly.

While the facts adduced in evidence do not rise to a level which would justify granting any substantive relief on this motion, nevertheless Ostrer's claims are colorable, and the issues tendered arise in a sensitive area affecting the fundamental constitutional rights of persons charged with crimes. He is entitled to litigate these issues on the merits prior to his incarceration.

If the foregoing factors alone are deemed insufficient to warrant enlarging defendant on bail pending appellate finality, we add a general observation applicable to all convicted criminals except those whose liberty directly threatens the public peace, or who show propensity for flight. Ostrer is a mature person, whose sentence has the primary purposes of general deterrence, and specific deterrence. To the extent that our federal prison system can do anything for a convict, an we think it can, the benefits of incarceration depend upon the prisoner adjusting himself to the highly structured society of the institution, and participating fully and willingly in the educational programs and the prison industries. Before the average man will do this, all hope must be removed, except the hope of earning good time or early parole.

A prisoner who has his mind on his pending writs devotes all of his energy and thought to pending collateral attacks upon his conviction, and gains no benefit from any of the programs in the prison. Such a man is a disruptive factor for those who do not have pending writs, and has no incentive to throw himself into the many voluntary programs and make the best use of his time. Generally, we would be well advised to restructure our judicial system so as to gain early finality of judgments, and whenever possible defer imprisonment until such finality has been reached.

For all of the foregoing reasons, and because we cannot say that this motion was in any sense frivolous, or dilatory, defendant is continued on his existing bail pending appellate finality, unless the Court of Appeals shall direct otherwise, or shall interpret its December 17, 1974 order so as to represent a clear withdrawal from this District Court of the power to enlarge defendant upon such bail. We do not so read that order.

So Ordered.

Dated: New York, New York
June 4, 1976

CHARLES L. BRIEANT,
U.S.D.J.

Appendix 2.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of October, one thousand nine hundred and seventy six.

PRESENT: Hon. J. Edward Lumbard,
Hon. William H. Mulligan,
Hon. E. A. Van Graafeiland,
Circuit Judges.

UNITED STATES OF AMERICA,
APPELLEE,

76-1282

v.

LOUIS C. OSTRER,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Southern District of New York.

The District Court, after a full and complete evidentiary hearing, denied appellant's motion for a new trial, with extensive findings of fact and conclusions of law. These findings were amply supported by the testimony, and the conclusions based thereon were in accordance with established and appropriate legal principles.

It is clear that the New York State authorities, in communicating with the federal prosecutor, were motivated by a proper desire and obligation to protect the administration of

justice from illegal tampering and interference. We see no impropriety in this and no prejudice which resulted.

The order appealed from is affirmed and the mandate shall issue forthwith.

Appendix 3.

UNITED STATES COURT OF APPEALS.
SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of December, one thousand nine hundred and seventy-six.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE, 76-1282

v.

ANTHONY SOLDANO, JOHN DIOGUARDI,
GARY FREDERICKS, MICHAEL HELLERMAN,
MICHAEL CARICATO, FRED GOODMAN,
RICHARD GREENBERG, LOUIS OSTRER,
MORRIS WINTER,
DEFENDANTS,

LOUIS OSTRER,
DEFENDANT-APPELLANT.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, Louis Ostrer, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge

Supreme Court, U. S.
FILED
MAR 8 1977
MICHAEL RODAK, JR., CLERK

No. 76-1006

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOUIS OSTRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

SIDNEY M. GLAZER,
JOSEPH S. DAVIES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1006

LOUIS OSTRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37a-38a) is not reported. The opinion of the district court (Pet. App. 1a-36a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1976. A petition for rehearing was denied on December 21, 1976 (Pet. App. 39a). The petition for a writ of certiorari was filed on January 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner is entitled to a new trial because a state agent overheard and relayed to the federal

prosecutor a conversation between petitioner and an attorney discussing a plan to obstruct justice at petitioner's federal trial, when the prosecutor made no use of the information.

STATEMENT

An indictment returned in the United States District Court for the Southern District of New York on May 27, 1971, charged petitioner and others with various violations of the federal securities laws, mail and wire fraud, and conspiracy. On January 26, 1973, following a jury trial, petitioner was convicted on 11 counts of the indictment. He was sentenced to a total of three years' imprisonment and fined $55,000. On January 4, 1974, the court of appeals affirmed. *United States* v. *Dioguardi*, 492 F. 2d 70. This Court denied certiorari. 419 U.S. 829.

On December 11, 1974, petitioner moved for a new trial on the ground of newly discovered evidence, claiming that during trial the prosecutor had knowledge of conversations between petitioner and his attorney. Petitioner asserted that the New York State district attorney's office turned over to the federal prosecutor information derived from an illegally intercepted conversation between petitioner and Julius November, a friend and a lawyer, and that this information caused the prosecutor not to call Aubrey Moss as a government witness at petitioner's trial.[1] Following a hearing, the district court denied the motion in a thorough opinion, on which we basically rely (Pet. App. 1a-36a).

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[1]Petitioner notes (Pet. 9-10) that several discussions concerning petitioner's anticipated federal trial were overheard. There is no suggestion in the record that any of these discussions (other than the one between petitioner and November) even arguably involved attorney-client confidences, or that the substance of any other conversation was disclosed to federal officials.

The evidence at the hearing on petitioner's motion showed that New York state law enforcement authorities commenced electronic surveillance of petitioner's office and telephones in late October 1972, while petitioner was awaiting trial on the federal charges. The surveillance—which was conducted pursuant to orders issued by state judicial officers—continued until February 21, 1973, after petitioner's federal trial, and it was part of an investigation principally directed at obtaining evidence that petitioner and others were committing the state crime of usury (App. 209-210, 678-679).[2] The federal government took no part in this investigation. During the course of the state's court-ordered electronic interceptions, a detective overheard a conversation on November 21, 1972, among petitioner, William Kilroy, and Julius November, a lawyer.[3] The detective was unaware (Pet. App. 13a), and the conversation did not disclose, that November was a lawyer (App. 54-55, 172, 681-682).

The conversation began with a discussion of loans but soon turned to other matters. The detective concluded that he was overhearing preparations for a crime—the blackmail of Aubrey Moss, a potential witness at a trial (App. 687). It could be inferred from the conversation that November possessed a typewritten statement that Moss, a married man whom petitioner and November believed would be a government witness in the federal trial, was having an affair with a secretary in petitioner's

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[2]"App." refers to petitioner's appendix in the court of appeals.

[3]November had represented petitioner in civil litigation. He is not familiar with federal practice in criminal cases (Pet. App. 10a), and he did not represent petitioner in any of his criminal trials (Pet. App. 5a-6a).

office. The two men then discussed how the statement could be used to discourage Moss from testifying in the upcoming trial (see Pet. App. 6a-10a and n. 6).

Believing that he might have overheard an attempt to commit the state crime of coercion of a witness (Pet. App. 13a-15a), the detective discussed the conversation with fellow officers. Ultimately the matter was brought to the attention of the state district attorney's office (App. 687-688). State prosecutors agreed that they were obliged to alert the federal prosecutors to a potential obstruction of justice (Pet. App. 16a). Because of legitimate concern for the security of the state investigation, however, they agreed not to tell the federal prosecutors the source of the State's information (Pet. App. 16a-18a; App. 691-692).

At a meeting on December 22, 1972, a representative of the district attorney's office informed the federal prosecutor that petitioner possessed information about Moss that might be used in an effort to obstruct justice (Pet. App. 18a). The state prosecutor did not reveal the source of this information, nor did he recommend what use, if any, should be made of the information (*ibid.*). The federal prosecutor responded that there was no possibility that information about Moss could be used to obstruct justice in the federal case, because the government already had decided not to use Moss as a witness (*ibid.*; App. 390, 394-395, 694-695). There were no further contacts between the state and federal prosecutors until after petitioner's trial (Pet. App. 20a).

The district court concluded that the information communicated had no effect whatsoever on the federal trial (Pet. App. 29a-33a). It found that prior to his meeting with the state authorities, the federal prosecutor had interviewed Moss and, based on his belief that Moss would

be an untruthful witness, had decided not to call him to the stand (*id.* at 29a-30a). It also found that Moss's testimony would not have aided petitioner's defense, a conclusion that is supported not only by petitioner's desire not to have him testify but also by the absence of any defense efforts to secure his testimony (*id.* at 23a-24a, 30a-31a). The court wrote that the state surveillance was conducted without the knowledge or participation of the federal government and pursuant to court orders that were believed by the state officers to be lawful (*id.* at 24a, 26a-29a);[4] that the state detective who overheard the conversation had no reason to believe that November was an attorney (*id.* at 13a, 27a); and that the members of the district attorney's office who later listened to the recording concluded reasonably and in good faith that the intercepted conversation concerned a plan to coerce Moss not to testify against petitioner in his pending federal trial (*id.* at 13a-16a, 27a-28a).

The court concluded that the decision of the state authorities to report their suspicions to the federal prosecutor was "motivated solely by a high-minded sense of ethical obligation to insure proper and unobstructed administration of federal criminal justice" (Pet. App. 28a) and that "[t]he scope and extent of the communication [to the federal prosecutor] were severely limited to that sufficient to satisfy the necessit[y]" (Pet. App. 25a) to alert the federal authorities to a possible obstruction of justice.

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[4]On February 4, 1975, a state court held that prior wire interception orders directed against persons other than petitioner had been issued without an adequate showing of probable cause (see Pet. App. 24a). Since the conversations intercepted pursuant to those defective orders were used to establish probable cause for the electronic surveillance of petitioner's offices, the government stipulated for purposes of the new trial motion that the interception of petitioner's conversation on November 21, 1972, was tainted. Although petitioner does not appear to have standing to challenge the legality of the original interceptions, which did not violate his rights, we do not dispute that stipulation here.

The district court held that a new trial is not automatically required by any overhearing of attorney-client conversations if, as here, the actions of both federal and state authorities, rather than being corrupt, are "pursued in complete good faith" (Pet. App. 29a). The court also concluded that, because petitioner had suffered no prejudice as a result of the State's overhearing the November conversation, a new trial was not warranted (*id.* at 29a-33a). The court of appeals affirmed, relying on the opinion of the district court (*id.* at 37a-38a).

ARGUMENT

Petitioner's contention that there must be a new trial whenever any conversation between a defendant and an attorney is overheard by a law enforcement agent is foreclosed by *Weatherford* v. *Bursey*, No. 75-1510, decided February 22, 1977. *Weatherford* held that the Sixth Amendment's right to counsel could be infringed only by a purposeful intrusion into attorney-client confidences or use of confidential information by the prosecutor at trial. Neither occurred here.

Whether or not the overheard information—that petitioner and attorney November contemplated using knowledge of Moss's alleged adultery either to discourage Moss from testifying or to impeach his credibility—would have been useful to the government,[5] the fact remains that, at the time this information was transmitted, the federal prosecutor already had decided not to call Moss as a witness. The federal prosecutor did not capitalize on any information learned from intrusions into legitimate trial

[5]It is unlikely the information would have been of any use even if the government had wanted to call Moss as a witness, because, as the district court noted (Pet. App. 10a-12a), adultery is not a basis for impeachment of a witness's credibility.

planning conferences. Here, as in *Weatherford*, the important Sixth Amendment concerns have not been activated, and there is no need to inquire further. Nothing undermined the proper functioning of the adversary system in petitioner's criminal case.[6]

Weatherford also exposes the error of petitioner's argument (Pet. 27-30) that the district court was required to assume that the state prosecutor transmitted more than the information regarding Moss, and that the federal prosecutor capitalized upon this information. Petitioner was afforded an evidentiary hearing to establish what was communicated by the state to the federal prosecutor, and the district court found that only the information relating to Moss's alleged adultery was revealed.[7] District courts are

[6]The court of appeals' refusal to adopt a *per se* rule requiring a new trial whenever attorney-client conversations have been overheard does not conflict with this Court's decision in *Black* v. *United States*, 385 U.S. 26, and *O'Brien* v. *United States*, 386 U.S. 345, as *Weatherford* v. *Bursey*, *supra*, slip op. 6, makes clear:

> If anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial. This is a far cry from the *per se* rule announced by the Court of Appeals below, for under that rule trial prejudice to the defendant is deemed irrelevant. Here, the courts below have already conducted the "judicial determination," lacking in *Black* and *O'Brien*, of the effect of the overheard conversation on the defendant's conviction, and there is nothing in their findings nor in the record to indicate any "use of evidence that might otherwise be inadmissible."

[7]Even if the information had been used to advantage by the federal prosecutor, it would be hard to imagine how this could have affected the fairness of petitioner's trial in any particular. November, although an attorney, was not retained by petitioner to represent him in the federal trial. No conversations between petitioner and his retained counsel were

capable of determining the extent of any communication (*Weatherford, supra,* slip op. 10-11), and their evidentiary findings are controlling unless clearly erroneous.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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heard; no legitimate trial strategy was compromised; no critical information was disclosed. The detective who overheard the conversation between petitioner and November did not know that November was an attorney; any prophylactic rule based on the Sixth Amendment could not deter overhearings of this variety.

Moreover, even in the context of the traditional attorney-client relationship, discussions of committing crime are not privileged. *Clark* v. *United States*, 289 U.S. 1, 15 (*dictum*); 8 Wigmore, *Evidence* §§ 2298, 2299 (McNaughton rev. 1961). So far as state authorities knew, petitioner and November never had discussed any legitimate defense strategy; their conversation, instead, seemed to concentrate on the planning of a crime, for which there is no constitutionally-protected claim of confidentiality. Finally, any use the federal prosecutor could have made of the conversation between petitioner and November would have protected the legal system against subversion by apparent blackmail; in other words, use of the information, far from undermining the adversarial criminal justice system, would have prevented the system from being undermined.

[8]Although, as we said in *Weatherford* (Br. 48 n. 33), it may be appropriate to resolve against the government doubts regarding the extent of the information communicated by an agent, this is not a reason to hold new trials in every case—especially where, as here, the extent of the transmission of information has been reliably determined.

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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1006.

LOUIS OSTRER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner's Reply Brief.

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Argument.

In *Weatherford* v. *Bursey*, ____ U.S. ____ (February 22, 1977), the respondent asked this Court to affirm the holding of the Fourth Circuit that "whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship, the right to counsel is sufficiently endangered to require reversal and a new trial" (Slip opinion at p. 3, quoting 528 F. 2d 483 (1975)). The Solicitor General

opposed an absolute rule of reversal in the absence of actual communication of the overheard material to the prosecution. He conceded, however, that Sixth Amendment concerns "are activated" whenever there is "actual acquisition by the prosecution of confidential defense strategy information" (Solicitor General's brief in *Weatherford* at p. 32). This Court, in rejecting respondent's argument and accepting the Solicitor General's, repeatedly drew the distinction between cases where there was no communication of defense strategy to the prosecutor (such as in *Weatherford*) and cases where there was such communication (Slip opinion at pp. 3, 4, 8, 10). The Court limited its decision to cases where "nothing at all" was communicated to the prosecution. It explicitly left open the question whether a new trial would be required in cases where the thrust of the unlawfully overheard defense strategy conversations had been communicated to the prosecution. Indeed, it strongly implied that reversal *would* be required in cases of actual communication: "had the prosecution *learned* from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, *Bursey would have a much stronger case*" (Slip opinion at p. 8; emphasis added).

This is precisely that "much stronger case." In *Weatherford*, this Court said that the argument for a new trial "founders on the District Court's express finding that Weatherford *communicated nothing at all* to his superiors or to the prosecution about Bursey's trial plans or about the upcoming trial." Here, the District Court made precisely the *opposite* finding from that made in *Weatherford* (Slip opinion at p. 10). The District Court here found (and the Court of Appeals adopted this finding) that Assistant District Attorney "Fine did transmit information to [trial prosecutor] McGuire that he derived from the eavesdropping on

Ostrer's conversations" (App. 25a). Moreover, the Government conceded in the court below that "the thrust of the conversation" between petitioner and his attorney concerning the legal strategy to be employed in dealing with a potential government witness *was transmitted* to the trial prosecutor (Government's brief on appeal at p. 45).

In a less-than-candid effort to persuade this Court that *Weatherford* forecloses reversal of petitioner's conviction, the Solicitor General's brief deliberately misrepresents petitioner's contention and seriously misstates the District Court's findings.

The Solicitor General's brief describes the "petitioner's contention" as follows: "that there must be a new trial whenever any conversation between a defendant and an attorney is overheard" (Brief for United States in Opposition at p. 6). *Petitioner challenges the Solicitor General to quote or cite a single reference to any such contention in the entire record of this case!* It has never been petitioner's contention that a new trial is required "whenever any conversation between a defendant and an attorney is overheard." It is petitioner's contention — and it has consistently been throughout this case — that reversal is required only when the unlawfully overheard conversation "has been directly and deliberately *communicated* to the Assistant United States Attorney who prosecuted the petitioner" (Petition at p. 4 (emphasis added); *see also* Petition at pp. 6, 8, 14, 16, 17, 19, 20, 25, 31).[1]

[1]It is inconceivable that the Government's misrepresentation of petitioner's contention could have been anything but deliberate. It is — and has been — the essence of petitioner's argument to distinguish those cases where there has been no *communication* (such as *Weatherford*) from those cases (such as his own) where there *was actual communication*. Indeed, the very first sentence of his argument in the Petition emphasized that distinction by italicizing the crucial words: "An exhaus-

This is the first and only case, to petitioner's knowledge, in which a conviction has been affirmed in the face of an express finding of fact — and Government concession — that the thrust of an unlawfully overheard conversation between a criminal defendant and one of his lawyers dealing with defense strategy was *communicated* to the actual trial prosecutor. That important and recurring issue was expressly left open by this Court in *Weatherford*; the Government cannot make petitioner's contention appear "foreclosed by *Weatherford* v. *Bursey*" by simply misrepresenting — as it has done — petitioner's actual contention.

The Solicitor General's brief also seriously misstates the trial court's findings, in an apparent effort to persuade this Court that here "as in *Weatherford*, the important Sixth Amendment concerns have not been activated, and there is no need to inquire further" (Brief in Opposition at p. 7).

The Government asserts, without record citation, that the only information overheard was "a plan to obstruct justice at petitioner's federal trial," and that there was no overhearing of any other conversations "even arguably involv[ing] attorney-client confidences" or "legitimate trial strategy" (Brief in Opposition at pp. 2, 8).

Although the Government has consistently *argued* that the conversation between petitioner and attorney Julius November was not a privileged communication between a defendant and his lawyer, the District Court expressly rejected this argument and found — after an extensive evi-

tive search of the cases reveals that the Second Circuit is the only Circuit to have *ever* affirmed a conviction in the face of a record on which the Government concedes that there was *actual communication to the trial prosecutor* of the thrust of unlawfully intercepted legal strategy sessions between a criminal defendant and his lawyer" (Petition at p. 16; emphasis in original). This emphasis on the actual communication of overheard material is repeated on virtually every page of the Petition.

dentiary hearing — that the conversation at issue was an "attorney-client communication" covered by the privilege. See Appendix at p. 6a.[2] The trial court expressly refused to find — though the Government pressed it to do so — that the overheard and transmitted November-Ostrer conversation was "a plan to obstruct justice at petitioner's federal trial." Accordingly, the Government's "Question Presented," as well as most of its legal argument, is premised on an assumption expressly rejected by the District Court. This case must be decided on the premise — which is true as a matter of fact as well as law — that the unlawfully overheard and communicated November-Ostrer conversation involved legal counsel and strategy between the defendant and his retained lawyer[3] concerning the upcoming federal trial.

Moreover, the record clearly establishes — and the trial court plainly found — that the state officials did overhear a great deal of defense strategy in addition to the November-Ostrer conversation. The trial court found that the District Attorney's office overheard repeated discussions concerning the following matters related to the "impending federal trial":

> "Among the more significant topics discussed were, (1) whether Ostrer should seek a trial severance from his co-defendant John Dioguardi; (2) whether Ostrer should waive his right to a jury trial and testify in his

[2] We therefore conclude that "for purposes of this motion, November was acting as an attorney for Ostrer," and that "Ostrer reasonably believed that November was extending legal counsel. . . ." *Ibid.*

[3] The Government's assertion that November "was not retained by petitioner to represent him in the federal trial" (Brief in Opposition at p. 7) is simply not true. November was not retained to *appear* for him at the federal trial, but he was most assuredly retained to *advise* him about the federal trial, and he participated extensively in pre-trial preparations, as the wiretap tapes themselves establish.

own behalf; (3) the likely impact of Ostrer's testimony, considered in light of disclosure on cross-examination of his prior state felony conviction as impeachment; and (4) the tactical value of having Ostrer introduce certain cancelled checks. Also mentioned was the name of Ostrer's private investigator, one James Lynch, formerly of the Federal Bureau of Investigation." (App. 4a.)

There can be no doubt that these overheard conversations involved "legitimate trial strategy." The fact that these discussions were not with Maurice Edelbaum — the lawyer who *appeared* for petitioner at his criminal trial — is irrelevant to petitioner's claim, especially since the trial judge expressly found that these overheard conversations "included discussions by others with Ostrer of Mr. Edelbaum's comments and advice" (App. 4a). The Sixth Amendment and the right to a fair trial rule surely protect the defendant from unlawful overhearing of defense strategy and legal advice, even if the voice of the chief trial lawyer, as distinguished from that of an attorney on the defense team, is not overheard.

The Government's brief flatly misrepresents the trial court's findings when the brief asserts that other than the December 22, 1972, meeting between the Assistant District Attorney and the trial prosecutor, "[t]here were no further contacts between the state and federal prosecutors until after petitioner's trial" (Brief in Opposition at p. 4). The District Court found that Assistant District Attorney "Fine's diary entry for December 29, 1972 (Ex. B) shows that on that date Fine telephoned McGuire to inquire whether Moss was under subpoena for the Belmont trial. Fine recommended that the subpoena remain in effect. McGuire was willing to keep Moss under subpoena to accommodate Fine, and because he could not be certain that some circumstance might not develop at trial making Moss's testimony significant" (App. 20a). Thus, there was at least one "further contact" of considerable significance between the state and federal prosecutors prior to the termination of petitioner's trial.

The Government tries to dismiss any possible role that the transmitted November-Ostrer conversation might have played in McGuire's trial strategy by claiming that, by the time he received the transmission, "the federal prosecutor already had decided not to call Moss as a witness" (Brief in Opposition at p. 6). However, in view of the federal prosecutor's affidavit submitted to the District Court making no more of a claim than that he had "just about decided" not to use Moss as a witness, and in view of the prosecutor's testimony at the evidentiary hearing, the District Court did not make any such categorical finding. Rather, the court's findings recognized that McGuire, while leaning away from calling Moss as a witness, nevertheless kept him under subpoena in part "because he could not be certain that some circumstance might not develop at trial making Moss' testimony significant" (App. 20a). Thus, it cannot be disputed that at the time Assistant United States Attorney McGuire made his final decision not to use Moss as a witness, he (McGuire) had in mind Assistant District Attorney Fine's warnings about Moss' vulnerability as a witness. One would indeed need a crystal ball to weigh and determine precisely how this knowledge might have influenced McGuire's ultimate decision as to Moss.

Furthermore, the Government again misstates critical facts found by the District Court when its brief attempts to convey the impression (1) that the Ostrer-November overheard and transmitted discussion was part and parcel of a plot to discourage Moss from testifying (Brief in Opposition at p. 4), (2) that the entire November plan was to threaten or seek to introduce at the trial evidence of Moss' adultery

(*id.* at p. 6, n. 5), (3) that only information about Moss' adultery was transmitted to the trail prosecutor (*id.* at p. 7), and (4) that in any event it did not matter that the trial prosecutor knew that Ostrer and November knew of Moss' adultery, since evidence of this adultery would not have been admissible at the trial to impeach Moss (*id.* at p. 6, n. 5). In all of these four matters, the facts are quite contrary to the Government's contentions.

First of all, the Ostrer-November plan was not to discourage Moss from testifying, but was, rather, calculated to extract from him at the trial certain information possessed by Moss that Ostrer and his counsel believed to be exculpatory. The heart of the District Court's opinion seeks to analyze Moss' potential testimony on cross-examination and to determine if in fact it would have been exculpatory to Ostrer. (The court found that it "would not necessarily have been exculpatory of Ostrer," App. 31a, although the court could not, of course, say with any reasonable certainty that Moss' testimony clearly would not have helped Ostrer.)

Secondly, evidence of Moss' adultery was only a tiny and relatively unimportant piece of the total information that November felt could be extracted from Moss on cross-examination. More important than the adultery testimony would have been Moss' testimony that he and Ostrer were equal partners in any profit earned by Moss' investment, thereby contradicting the chief Government witness Hellerman's testimony that he (Hellerman) was partners with Ostrer. (See the District Court's discussion and analysis of Moss' possible testimony at Appendix pp. 31a-32a.) November's plan was far more sophisticated than the Solicitor General's brief would lead one to believe.

Third, the adultery information transmitted to the trial prosecutor was not the "only" information revealed. In

fact, specific information about Moss' adultery was not transmitted at all. Rather, what was transmitted by Fine, as found by the District Court, was the more general conclusion that "Ostrer had certain information regarding Moss" and that "this information would be used to effect an obstruction of justice." This was, of course, Fine's way of warning McGuire not to use Moss as a witness, and McGuire got the message, for he told Fine, as found by the District Court, that Fine need not worry, since McGuire would not call Moss as a witness (App. 18a).

Fourth, the Government can get no solace from the claimed inadmissibility at trial of the evidence of Moss' adultery. The intercepted Ostrer-November conversation made it perfectly clear that a major reason for keeping available as a witness the woman with whom Moss was having an affair was not so that she could testify as to the affair, but rather so that she could testify that on numerous occasions Moss had made to her statements about Ostrer that either contradicted what Moss had told the Government about Ostrer or revealed Moss' motives for wanting to bury Ostrer. Thus, this witness could impeach Moss insofar as Moss might have testified on direct examination against Ostrer, while Moss himself as a witness would have supplied significant exculpatory evidence on cross-examination. All of this the Government skips over in its brief.

Furthermore, the Solicitor General can hardly now rely (Brief in Opposition at p. 6) upon the purported "good faith" of the Government, since in its brief in *Weatherford* the Government recognized that the dangers to the Sixth Amendment are just as great if the defense strategy was overheard in good faith or in bad faith. (See Solicitor General's brief in *Weatherford* at pp. 30-31, quoted in Ostrer's Petition at p. 19.)

One of the most serious errors in the Government's Brief in Opposition is the claim that there is no need to resolve any doubts against the Government here (notwithstanding its concession in its *Weatherford* brief that such doubts should be resolved against the Government) because "the extent of the transmission of information has been reliably determined" (Brief in Opposition at p. 8). One of the most serious problems facing the petitioner at the evidentiary hearing was the mysterious, unexplained loss of the critical document that could have established authoritatively what further information was in fact transmitted to the trial prosecutor — the detailed notes of the Assistant District Attorney. (The trial prosecutor, who kept detailed notes of other events, claimed not to have made any notes of the critical meeting with Mr. Fine.) (See discussion in the Petition at pp. 27-30.) Surely the most serious doubts are raised, especially in a subtle case such as this where the extent of communications, and the impact of those communications on the prosecutor's thinking process, are being explored by a defendant who does not even have access to contemporary notes taken at the critical transmission of information.

The Solicitor General also seeks false comfort by claiming that the police officers who intercepted the attorney-client conversations did not know and had no way of knowing that November was an attorney. This claim, even if true, overlooks the fact that Assistant District Attorney Fine, who supervised the policemen and who listened to the tape recordings and read the wiretap logs, admittedly knew (as the District Court found) that November was indeed an attorney (App. 13a).

Conclusion.

The District Court's findings of fact make this precisely the "much stronger case" than *Weatherford* and the case left undecided by that decision. The issue of whether a new trial is required when unlawfully overheard legal strategy discussions have been communicated to the trial prosecutor is an important and recurring one over which the Circuits are irreconcilably split. The effective administration of justice requires this Court to grant the instant petition in order to resolve this important conflict. At the very least, this case should be remanded to the lower courts for reconsideration in light of *Weatherford* v. *Bursey*.

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